Supreme Court, U.S.
FILED

10-768 DEC 8 - 2010

No. OFFICE OF THE CLERK

In the
Supreme Court of the United States

AFTERMATH RECORDS (D/B/A AFTERMATH ENTERTAINMENT), INTERSCOPE RECORDS, UMG RECORDINGS, INC.,

Petitioners,

v.

F.B.T. PRODUCTIONS, LLC, EM2M, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 2010

QUESTIONS PRESENTED

In *Ortiz v. Jordan*, No. 09-737, this Court granted certiorari and heard oral argument on November 1, 2010 on the following question: "May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?"

This case presents the same basic questions as *Ortiz*, outside the qualified-immunity context:

1. May a party obtain appellate review after trial of the pretrial denial of summary judgment, or must a party preserve the issues it argued at summary judgment in the ways required by the rules applicable at trial?

2. If appellate review after trial of the denial of summary judgment is ever appropriate, is such review limited to purely legal questions not tied to the evidence, or does it also extend to mixed questions of law and fact that require review of the trial (or summary judgment) evidence?

3. In all events, is summary reversal required where respondents explicitly disavowed in the district court and on appeal the argument that the district court erred by allowing the jury to interpret the contract and did not argue in their opening or reply brief on appeal that they sought review of the denial of summary judgment, and the Ninth Circuit simply ignored those forfeitures without suggesting any legitimate basis to overlook them?

CORPORATE DISCLOSURE STATEMENT

Petitioner UMG Recordings, Inc. ("UMG") is an indirect subsidiary of Vivendi S.A., which is a publicly traded corporation. Petitioner Interscope Records is a California general partnership. The partners in Interscope Records are UMG and PRI Productions, Inc., a Delaware corporation wholly owned by UMG. Petitioner Aftermath Records d/b/a Aftermath Entertainment is a joint venture co-owned by UMG, Interscope Records, and ARY, Inc. ARY, Inc., which was a defendant in the district court but was not a party in the court below, is not a publicly traded company, and no publicly traded company owns 10% or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

REASONS FOR GRANTING THE PETITION 12

I. THIS PETITION PRESENTS THE SAME IMPORTANT ISSUE AS *ORTIZ*. 14

A. The Court Should Hold This Petition Pending Resolution Of *Ortiz*. 14

B. This Case Demonstrates The Need For A Bright-Line Rule In *Ortiz*. 18

C. In The Alternative, This Court Should Grant This Petition To Consider The Question Presented In *Ortiz*. 27

II. THIS COURT SHOULD SUMMARILY REVERSE THE NINTH CIRCUIT'S UNJUSTIFIED AND UNEXPLAINED OVERLOOKING OF RESPONDENTS' MULTIPLE FORFEITURES. 29

CONCLUSION 35

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, dated Sept. 3, 2010 ..... 1a

Order of the United States District Court for the Central District of California Denying Plaintiffs' Motion for New Trial, dated May 12, 2009 ..... 16a

Order of the United States District Court for the Central District of California Denying Plaintiffs' Motion for Summary Judgment, dated Jan. 20, 2009 ..... 34a

Order of the United States Court of Appeals for the Ninth Circuit Denying Appellees' Motion to Defer Submission, dated Aug. 2, 2010 ..... 52a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc, dated Oct. 21, 2010 ..... 53a

Constitutional and Statutory Provisions Involved 54a

Respondents' Letter to the Court of Appeals Pursuant to Fed. R. App. P. 28(j), dated July 6, 2010 ..... 56a

Excerpts from Trial Exhibit 5 (Mar. 9, 1998 Agreement), CA9 ER 837-846 ..... 58a

Excerpts from Trial Exhibit 9 (Sept. 27, 2000 Novation), CA9 ER 879-883 ..... 65a

Excerpt from Trial Exhibit 17 (Nov. 1, 2004), CA9 ER 1011 ..... 69a

Proposed Jury Instruction 25 (A), CA9 ER 422 ... 72a

TABLE OF AUTHORITIES

Page(s)

CASES

Banuelos v. Constr. Laborers' Trust Funds for S. Cal.,
382 F.3d 897 (9th Cir. 2004) 11, 28

Black v. J.I. Case Co.,
22 F.3d 568 (5th Cir. 1994) 20

Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.,
51 F.3d 1229 (4th Cir. 1995) 20, 25

Christian Legal Society v. Wu,
No. 06-15956, 2010 WL 4629597 (9th Cir. Nov. 17, 2010) 31

City of Hope Nat'l Med. Ctr. v. Genentech, Inc.,
43 Cal.4th 375 (Cal. 2008) 4, 22

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 20

Ermolieff v. R.K.O. Radio Pictures,
19 Cal.2d 543 (1942) 22

Gramercy Mills, Inc. v. Wolens,
63 F.3d 569 (7th Cir. 1995) 28

Johnson v. Jones,
515 U.S. 304 (1995) 18

Metro. Life Ins. Co. v. Golden Triangle,
121 F.3d 351 (8th Cir. 1997) 20

Orion Tire Corp. v. Goodyear Tire & Rubber Co.,
268 F.3d 1133 (9th Cir. 2001) 22

Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.,
69 Cal.2d 33 (1968) 3

Pullman-Standard v. Swint,
456 U.S. 273 (1982) 20

Rekhi v. Wildwood Indus., Inc.,
61 F.3d 1313 (7th Cir. 1995) 28

Thompson v. Keohane,
516 U.S. 99 (1995) 20

United Ass'n of Journeymen v. Valley Eng'rs.,
975 F.2d 611 (9th Cir. 1992) 10

Unitherm Food System, Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 29

Wilson Arlington Co. v. Prudential Insurance Co.,
912 F.2d 366 (9th Cir. 1990) 23

Wolf v. Superior Court,
114 Cal. App.4th 1343 (2004) 23

STATUTES AND RULES

28 U.S.C. § 1254 1

Fed. R. App. P. 28(j) 9, 11, 14, 30, 31

Fed. R. Civ. P. 12(b)(6) 26

Fed. R. Civ. P. 50.....6, 12, 21, 33

Fed. R. Civ. P. 50(a).....7, 11, 26, 29

Fed. R. Civ. P. 50(b).....26, 29

Fed. R. Civ. P. 56 26

OTHER AUTHORITIES

9B Wright & Miller, Fed. Practice and Procedure § 2533 (3d ed. 2008) 21

Aftermath Records, Interscope Records, and UMG Recordings, Inc. respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's order and judgment, ___ F.3d ___, 2010 WL 3448098, is at App. 1a. The district court's decision denying respondents' motion for new trial is at App. 16a. The district court's decision denying summary judgment is at App. 34a.

JURISDICTION

The court of appeals issued its opinion on September 3, 2010. Petitioners' timely petition for rehearing was denied on October 21, 2010. App. 53a. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. VII and Fed. R. Civ. P. 50 are set forth at App. 54a.

STATEMENT

This case presents the same basic appealability issue that the Court is considering in *Ortiz v. Jordan*, No. 09-737. This case also underscores two important lessons about the issue in *Ortiz*: 1) The issue is by no means limited to the qualified-immunity context with its unique rules about interlocutory appeals, and 2) anything other than a bright-line approach — either precluding all post-trial appeals of the denial of summary judgment without additional steps to preserve the legal issue

for review, or strictly limiting any exception to purely legal issues that involve no review of the evidentiary record — is hopelessly manipulable. Indeed, this case is Exhibit A for the inherent manipulability of a loose approach allowing appeal of "legal" errors. The Ninth Circuit could find "legal" error here only after an extensive review of the evidentiary record. In particular, the Ninth Circuit reviewed the *trial* record, which underscores that something other than a review of a summary judgment decision (which presumably would focus on the summary judgment record) was afoot. To make matters worse, the Ninth Circuit could reach this "appeal of the denial of summary judgment" only by ignoring respondents' multiple forfeitures. And the Ninth Circuit engaged in all this manipulation not to correct an injustice but to create one and render the jury's careful deliberations for naught.

1. In 1995, Marshall Mathers was an unknown aspiring rapper. Today, he is better known as Eminem — one of the world's most popular recording artists. Eminem's fans purchase millions of dollars' worth of his music in a variety of formats such as CDs and permanent downloads through online music retailers. The suit underlying this petition concerns the appropriate calculation of royalties from those online sales.

Respondents are a small record company that signed Eminem in 1995. Respondents' efforts to sell his music were a commercial failure. Petitioners — also record companies — contracted with respondents to obtain Eminem's recording services. That contract, executed in 1998 and amended several times since, provides respondents with a share of

royalties from the exploitation of Eminem's recordings.

Not content with the millions of dollars they had received under the agreement, respondents sued in 2007, contending that petitioners had calculated royalties for permanent downloads under the wrong provision. The contract did not expressly address such downloads, which were not yet commercially available in 1998. Petitioners have paid respondents royalties on such online record sales under the standard royalty rates (18%-23%) that apply to "records sold in the United States . . . through normal retail channels." *See* App. 58a ¶ 4(a) (the "Records Sold" provision). Respondents claimed that download sales must instead be subject to the agreement's higher (50%) royalty under the "Masters Licensed" provision, which covers "masters licensed by us . . . to others for their manufacture and sale of records or for any other uses . . . of the masters." App. 61a ¶ 4(c)(v).

2. Both sides moved for summary judgment. Under long-settled (albeit idiosyncratic) principles of California law governing contract interpretation, the cross-motions for summary judgment centered on extrinsic evidence.

a. California law requires the trial court to provisionally consider any relevant extrinsic evidence, such as industry custom and usage. *See, e.g.*, *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal.2d 33, 39 (1968). This rule applies even where a contract appears unambiguous on its face. If the extrinsic evidence shows that the contract is reasonably susceptible to the parties' competing interpretations, the contract is deemed

ambiguous and summary judgment is inappropriate. The jury then resolves conflicts in the extrinsic evidence and may interpret the contract in its role as fact-finder. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal.4th 375, 395 (Cal. 2008).

b. The language of the Records Sold provision covers permanent downloads: downloaded music files are "records," and online music stores are "normal retail channels" for selling records. App. 63a ¶ 16(e). Indeed, iTunes is now *the* most popular retailer for recorded music. Although commercial downloads did not exist at the time of the agreement, changes in recording formats are common, and the agreement thus gives petitioners the right to exploit the Eminem recordings "in any and all forms of media now known and hereinafter developed." CA9 ER841 ¶ 8. The parties agreed that the Records Sold provision has applied to every other evolutionary configuration for the distribution of records, whether cassette, vinyl, or CD.

Respondents nonetheless claimed that the "Masters Licensed" provision governed because petitioners were providing master recording files to online retailers and the retailers thereafter made copies and distributed them to customers. App. 61a ¶ 4(c)(v). According to respondents, this arrangement necessarily constituted a "license," and extrinsic evidence of industry practice supported applying the Masters Licensed provision to any license. Respondents further argued that the Masters Licensed provision trumped the Records Sold provision because it appears in a section that follows the Records Sold provision and is preceded by the phrase "[n]otwithstanding the foregoing."

Petitioners' extrinsic evidence demonstrated a much different purpose for the Masters Licensed provision: that it was intended to apply only to third-party uses of masters for the third party's *own* purposes, such as compilation albums, movie soundtracks, or video games — not to the sale of petitioners' own records through normal retail channels. A 2000 amendment, for example, described respondents' share of royalties under the Masters Licensed provision with reference to "advances or fees" paid "in connection with any *ancillary* uses of each master recording." App. 66a–67a ¶¶ 6, 7(c) (emphasis added). Additional evidence regarding recording industry custom and practice confirmed that Masters Licensed transactions always have included only those licenses that involve "ancillary uses," not the principal means for distributing the recordings (*i.e.*, sales through normal retail channels).

In addition, a 2004 amendment to the Records Sold provision specifically identified "permanent download" sales and stated that the royalty rate for such sales would increase upon achieving specific sales targets. App. 70a ¶ 2(a). That language was consistent with the parties' pre-dispute performance, during which respondents accepted without objection petitioners' calculation of royalties for download sales under the Records Sold provision.

c. The district court denied both motions for summary judgment. App. 34a. The court found that neither the Records Sold nor Masters Licensed provision expressly covered downloads and that neither side had discussed royalties for downloads (or, indeed, anything about the Masters Licensed provision) during negotiations. App. 43a. The court

therefore "look[ed] to the nature of the contract and the surrounding circumstances to interpret the contractual language." *Id.* The court considered both parties' extrinsic evidence — thousands of pages' worth of declarations and exhibits — and concluded that "neither party has conclusively established that 'custom and practice' mandates a particular interpretation of the Masters Licensed provision. Instead, the parties' conflicting evidence creates a triable issue of fact." App. 47a.

3. The case was tried to a jury. The trial lasted eight court days and included 17 witnesses and hundreds of exhibits. At no time during trial did respondents ask the court to revisit its determination that the extrinsic evidence presented at summary judgment rendered the contracts reasonably susceptible to each side's interpretation. Respondents did not move for judgment as a matter of law ("JMOL") under Fed. R. Civ. P. 50 on the issue of the meaning of the contract or request an instruction interpreting the contract for the jury.

Respondents did not merely forfeit by inaction the argument that the court should construe the contract as a matter of law; respondents affirmatively disavowed it. The district court asked whether respondents wished to request a jury instruction that stated: "It is my job as judge to interpret the meaning of these agreements, and therefore, I will tell you what the recording agreements mean." *See* App. 72a. That pattern instruction explained that it "should only be given if the Court finds that any of the disputed contractual provisions are not 'reasonably susceptible' to the parties' competing interpretations and that there is no conflict in the extrinsic evidence that the jury must resolve." *Id.*

When the district court directly asked whether respondents sought that instruction, respondents stated that it was "not applicable." CA9 ER627.

The court submitted the interpretation of the contract to the jury. The jury found that the Records Sold provision and not the Masters Licensed provision applied to permanent download sales and returned a verdict for petitioners.

4. Respondents moved for a new trial, arguing (for the first time since their summary judgment motion) that the district court should have construed the agreement as a matter of law. Respondents' request for a *new trial* on this ground was incoherent: if respondents were correct that the court should have construed the contract in their favor as a matter of law, there would have been nothing to try. The court was not fooled and held that respondents had forfeited such relief by failing to move for JMOL under Rule 50(a) or to request an appropriate charge instructing the jury as to the contract's meaning. App. 22a–25a.

Respondents contended that they had preserved the argument because they had made their position clear at summary judgment and it would have been futile to raise the issue again at trial. The district court disagreed, explaining that respondents "never disputed the propriety of the Court's ruling on summary judgment, sought reconsideration of that decision, informed the Court that they believed it

was error to submit the issue to the jury, or objected to the jury instructions." App. 24a.[1]

5. Respondents appealed the district court's final judgment. In their opening and reply briefs, respondents did not argue that the Ninth Circuit should review the denial of their summary judgment motion. Instead, respondents argued that the Ninth Circuit should review *the jury's* interpretation of the contract *de novo*. Resp. CA9 Br. 25 (first argument heading: "The jury's erroneous interpretation of the recording agreements cannot stand") (capitalization omitted); Resp. CA9 Reply Br. 23 ("the jury's contract interpretation is reviewed *de novo* by this Court even though no JMOL motion was made"). In keeping with their challenge to the jury's interpretation, respondents relied on the trial record, not the summary judgment record.

Petitioners countered that respondents had forfeited the argument that the contract must be interpreted as a matter of law to bear respondents' claimed meaning. First, because respondents did not move for JMOL, they could not seek that relief on appeal. Second, because respondents had disavowed a jury instruction interpreting the contract, they could not challenge the court's decision to allow the jury to interpret the contract. In addition to arguing that their forfeitures were excused because it would have been futile to object to allowing the jury to

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[1] The district court also held that respondents' argument was meritless because the parties had presented conflicting expert testimony about the relevant custom and the jury had to resolve that dispute. App. 26a ("both versions of the accepted recording industry practice could not be true").

interpret the contract, respondents protested that they were "*not* arguing that the judgment must be reversed and the case remanded for a new trial because the District Court erroneously submitted the contract interpretation question to the jury." Resp. CA9 Reply Br. 23.

6. a. On July 6, 2010 — just six days before oral argument — respondents filed a letter under Fed. R. App. P. 28(j). That letter cited seven cases that respondents said supported their contention that the Ninth Circuit could review the jury's construction of the contract despite respondents' failure to seek JMOL. App. 56a–57a. Respondents also stated, for the first time, that the issue of contract interpretation "is also reviewable as an appeal from the denial of summary judgment on that legal issue." *Id.* None of those seven cases post-dated the appellate briefing. Respondents' letter offered no justification for proffering old authority to make a new argument on the eve of oral argument.

b. At oral argument, respondents confessed that they were "really appealing from the denial of summary judgment." Oral Argument Recording 14:00 (July 12, 2010), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000005791. Petitioners objected that respondents had never sought review of the denial of summary judgment in their briefs and that oral argument was far too late to raise a new argument. At oral argument, as in their letter, respondents offered no justification for their belated attempt to raise a new argument.

c. Nine days after oral argument, petitioners filed a Motion to Defer Submission. Petitioners first

argued that respondents' belated request for review of the denial of summary judgment was forfeited. Petitioners cited clear Ninth Circuit precedent holding that "we do not entertain contentions made for the first time at oral argument." Mot. at 3 (quoting *United Ass'n of Journeymen v. Valley Eng'rs.*, 975 F.2d 611, 614 n.5 (9th Cir. 1992)). In the alternative, petitioners explained that this Court had granted certiorari in *Ortiz* and would soon clarify whether a party may appeal the denial of summary judgment after trial. Petitioners thus argued that if the Ninth Circuit was inclined to consider respondents' belated request for review of the denial of summary judgment, the court should defer submission pending this Court's decision in *Ortiz*. *Id.* at 5-7. Respondents' opposition, yet again, made no attempt to justify their belated request.

The court of appeals denied petitioners' motion without comment on August 2, 2010. App. 52a.

7. In an opinion filed September 3, 2010, the court of appeals reversed the district court's judgment on the jury's verdict.

a. The Ninth Circuit entirely ignored respondents' appellate forfeiture. It did not mention respondents' Rule 28(j) letter, petitioners' objection to it at oral argument, or petitioners' Motion to Defer Submission, or otherwise address in any way respondents' untimeliness in requesting reversal of the denial of summary judgment.

b. The Ninth Circuit held that respondents' contention that the contract was unambiguous and required judgment in their favor could be considered as an appeal of the denial of their motion for summary judgment. The court held that a Rule

50(a) motion was not required because respondents' "argument that the contracts are unambiguous raises an issue of law that does not rest on the sufficiency of the evidence to support the jury's verdict." App. 5a. Relying on cases cited in respondents' Rule 28(j) letter, the Ninth Circuit held that the "denial of summary judgment is subject to review on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would have required the district court to grant the motion [for summary judgment].'" App. 6a (quoting *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004)).

c. After discussing some of the evidence from the *trial record*, the court of appeals held that the district court should have granted *summary judgment*. The Ninth Circuit found that none of "the evidence regarding industry custom or the parties' course of performance" supported petitioners' interpretation and that the Masters Licensed provision unambiguously covers royalties on download sales. App. 13a. The court did not address the summary judgment record.

d. The Ninth Circuit did not address respondents' statement to the district judge that a jury instruction interpreting the contract for the jury as a matter of law was "not applicable." Nor did the Ninth Circuit address respondents' protests in their appellate briefs that they were challenging the jury's interpretation of the contract, rather than the district court's decision to send the contract's interpretation to the jury.

REASONS FOR GRANTING THE PETITION

I. *Ortiz v. Jordan* presents an important and recurring question on which the circuits are divided: May the losing party at trial appeal the pretrial denial of its summary judgment motion without taking additional steps like a Rule 50 motion to preserve the underlying issue? The circuits' decisions and the briefing and oral argument in *Ortiz* suggest three possible answers: (1) no, additional steps are always necessary; (2) no, unless the issue is "purely legal"; or (3) yes, if the issue is "legal" in any sense, even if it requires review of the evidentiary record.

If this Court adopts a bright-line approach and answers this question "no" in *Ortiz*, the Ninth Circuit's decision here plainly will fall along with the Sixth Circuit's decision. But even if this Court decides that a "purely legal" summary judgment argument may be raised on appeal after trial absent additional steps to preserve the legal issue, the Ninth Circuit's decision may still need to be reversed, depending on what the Court means by "purely legal." The court below held that it could review the extensive extrinsic evidence presented by both sides at trial to determine whether, in light of that evidence, the contract was reasonably susceptible to both sides' interpretations. Surely a decision that depends on such a review of the evidence should not count as "purely legal." And the decision below presents a cautionary tale about the inherent malleability of any exception, other than one that strictly limits purely legal issues to those that involve *no* consideration of evidence. In all events, because the Court's answer to this basic question in *Ortiz* will almost certainly inform

whether the decision below can stand, this Court should hold this petition pending its decision in *Ortiz*.

This case also underscores that the question in *Ortiz* is not in any way limited to the qualified-immunity context, just as the circuit split detailed in *Ortiz* is not tied to that doctrine. Petitioners thus submit that there is no reason why this Court should resolve *Ortiz* on grounds specific to the qualified-immunity context. If, however, the Court does not resolve this question in *Ortiz* or ties its decision to the unique rules that allow interlocutory appeals for a subset of decisions denying immunity at the summary judgment stage, the Court should grant this petition to resolve the broader underlying issue, which recurs outside the qualified-immunity context.

II. If the Court does not hold or grant this petition, summary reversal is warranted. The court of appeals grossly overreached by ignoring multiple forfeitures for which respondents offered no excuse. Respondents did not merely fail to move for JMOL on the ground that the contract had to be interpreted in their favor as a matter of law. They also explicitly disavowed an instruction that would have had the district court interpret the contract for the jury. Then, on appeal, they reaffirmed that they were not challenging the district court's decision to send the contract interpretation issue to the jury. And they first expressed an intent to appeal the denial of summary judgment on the eve of oral argument, in a Rule 28(j) letter that cited no new authority and offered no excuse for the sandbagging.

Despite all this, the Ninth Circuit inexplicably looked the other way in its zeal to overturn a jury

verdict. Countless decisions of that court declare that an issue not raised in a party's opening brief will not be considered. Declining to enforce that rule in this case without even acknowledging the issue, let alone offering a valid justification, is the height of arbitrariness, especially given the nature of the parties and issue here. This is not remotely a case of a *pro se* litigant who needs the court's help, or even of a temptation to ignore procedural defaults to avoid a manifest injustice. Respondents were well-represented; they have received millions of dollars in royalties even under petitioners' interpretation of the contract; and the Ninth Circuit's effort ignored the jury verdict to create — not to remedy — an injustice.

I. THIS PETITION PRESENTS THE SAME IMPORTANT ISSUE AS *ORTIZ*.

A. The Court Should Hold This Petition Pending Resolution Of *Ortiz*.

This Court granted certiorari in *Ortiz* to address an important issue on which courts are divided: "May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?" The briefs and oral argument in *Ortiz* make clear that this Court's resolution of this question in *Ortiz* will likely govern the present case.

1. The substantive issue in *Ortiz* is whether the respondents enjoy qualified immunity, and the formulation of the question presented there could be understood to suggest that the answer could turn on the fact that an interlocutory appeal is permitted under some circumstances when immunity is denied at the summary-judgment stage. The briefs and oral

argument, however, make clear that Ortiz is *not* contending that the reviewability of the denial of summary judgment after trial turns on the defendants' "cho[ic]e not to appeal the order" denying summary judgment immediately. *Ortiz* Pet. i.

Ortiz's reply brief makes explicit that an official who unsuccessfully claims qualified immunity at summary judgment is free to choose not to take an immediate appeal and to claim immunity at trial instead. *Ortiz* Reply Br. 8-9. The choice to forgo an immediate appeal in no way affects the substantive immunity from liability or prevents the official from raising issues related to immunity on appeal. Rather, like any other defendant who goes to trial, the official must preserve the immunity defense for appeal by raising it at trial, such as by proposing appropriate jury instructions (or objecting to inappropriate ones) or moving for JMOL on all or part of the claim. *See id.*

In short, the question in *Ortiz* is whether the denial of summary judgment is appealable *vel non* after trial; the choice not to take an immediate appeal uniquely available in the immunity context does not affect the answer to that question. As such, the Court's decision in *Ortiz* will apply equally to cases like this one where there is no right to an interlocutory appeal.

2. The proceedings in *Ortiz* point to three potential outcomes: a denial of summary judgment is reviewable after trial without taking additional steps to preserve the issue (1) never; (2) only where the summary judgment argument raises a "purely legal" question; or (3) whenever the summary

judgment argument has a "legal" component, even if it requires review of the trial record.

Ortiz's primary submission is that the denial of summary judgment itself is never appealable after trial. *Ortiz* Tr. of Oral Arg. 52; *Ortiz* Reply Br. 11. Ortiz's secondary submission is that any exception to such a bright-line rule should be limited to "pure" questions of law, *i.e.*, legal questions "as to which the facts are not merely undisputed *but immaterial*." *Ortiz* Reply Br. 12 (quotation omitted). In contrast to such pure legal issues not tied to the trial record, "mixed" questions of law and fact depend on the record, even when evidence is undisputed, in that the court has to apply the law to that evidentiary record. *Id.* at 13-14.

The respondents' position in *Ortiz* is harder to pin down. At times, they appear to endorse Ortiz's secondary submission that only pure issues of law from the denial of summary judgment may be considered on appeal after trial. *See Ortiz* Resp. Br. 11 ("Critical to each of these decisions is the purely legal nature of the claim under review."); *id.* at 32. At other times, however, they suggest a far broader scope for post-trial summary judgment appeals. Although they stop short of saying so in clear terms, their position appears to be that any issue with a legal component suffices, even if — as is concededly true for their immunity defense — the issue requires the court to review the trial record and apply the law to the evidence. *See* Tr. of Oral Arg. 40 (respondents: "qualified immunity is always going to be an application of clearly established law through fact").

The reality is that the respondents in *Ortiz* need the Court to adopt a broad and malleable concept of

"legal" error to prevail. The issue the Sixth Circuit resolved in their favor was at most a mixed question of law and fact in that it required the court to review the evidence to determine whether a reasonable jury could have found that the respondents committed a violation of Ortiz's constitutional rights that was clearly established in the circumstances. But an "exception" so capacious as to embrace every issue with any legal content would swallow the rule.[2]

The Ninth Circuit's approach below bears a striking resemblance to the Sixth Circuit's decision and the respondents' position in *Ortiz*. Like the Sixth Circuit, the Ninth Circuit openly relied on the denial of respondents' summary judgment motion as the hook to ignore the jury verdict and to decide that the dispute should never have gone to the jury. That was the only potential hook, given that respondents failed to seek JMOL or request an appropriate instruction. The Ninth Circuit did not claim that whether the contract unambiguously dictated judgment for respondents was the kind of pure question of law that does not require review of the

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[2] To the extent respondents would borrow the test from *Johnson v. Jones*, 515 U.S. 304 (1995), for the appealability of denials of summary judgment on immunity grounds, that approach is doubly problematic. First, *Johnson* has proven difficult to apply in the qualified-immunity context. *See Ortiz* Tr. of Oral Arg. 30 (Justice Scalia describing "the *Johnson* line" as "a mess"). Second, this case demonstrates that the appealability issue extends beyond the immunity context, and outside that limited context the *Johnson* test plays no role. Judicial experience with the *Johnson* test even in the context for which it was designed has hardly been so satisfying that it should be exported to other contexts for an entirely different purpose.

evidence. No such claim would be remotely tenable under California law. Instead, much as the Sixth Circuit did in *Ortiz*, the Ninth Circuit reviewed the evidence (the trial, not the summary judgment, record) to determine whether there were factual disputes bearing on the interpretation of the contract.

Because of this close similarity, this Court's decision in *Ortiz* will likely govern the disposition of this case. First, if this Court holds that the denial of summary judgment may not be reviewed after trial, the Ninth Circuit's decision will obviously be invalidated. Second, if this Court recognizes only a narrow exception for pure issues of law that do not require review of the evidentiary record, the Ninth Circuit's decision likewise could not stand. Finally, if this Court adopts a broader exception, the fate of the decision below will depend on the specific guidance this Court offers in its opinion. This Court thus should hold this petition pending its decision in *Ortiz*.

B. This Case Demonstrates The Need For A Bright-Line Rule In *Ortiz*.

This case presents the same fundamental issue as *Ortiz* and confirms the importance of adopting a bright-line rule. Many courts have noted the malleability of a "legal" exception to the rule that the denial of summary judgment may not be appealed after trial. Members of this Court similarly articulated the concerns with such an approach at oral argument in *Ortiz*. The Ninth Circuit's decision here should eliminate any remaining doubt about the wisdom of adopting anything other than a bright-line approach precluding appellate review of denials of

summary judgment or limiting any exception to a narrow category of purely legal errors that require no review of the evidentiary record. The decision below provides a clear example of the inherent manipulability of any other approach.

1. Courts have emphasized the elusiveness of the distinction between "factual" and "legal" issues or decisions in this context. Most fundamentally, "[a]ll summary judgment[] [decisions] are rulings of law in the sense that they may not rest on the resolution of disputed facts." *Black v. J.I. Case Co.*, 22 F.3d 568, 571 n.5 (5th Cir. 1994) (declining to "craft a new jurisprudence based on a series of dubious distinctions between law and fact"); *see also, e.g., Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351, 355-56 (8th Cir. 1997); *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995).

This Court similarly has "noted the vexing nature of the distinction between questions of fact and questions of law" and could not identify any "rule or principle that will unerringly distinguish a factual finding from a legal conclusion." *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982) (citation omitted). This Court has made similar observations in many contexts. *See, e.g., id.* (Title VII); *Thompson v. Keohane*, 516 U.S. 99, 110-11 (1995) (habeas corpus); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401 (1990) (Rule 11 sanctions). Members of this Court made the same point at oral argument in *Ortiz*. *See, e.g.*, Tr. 29-30 (The Chief Justice: distinguishing between legal and factual issues "just creates an awful lot of difficulty that we don't need to buy into"). Indeed, even the *respondents* in *Ortiz* agreed that a distinction between "purely legal" and

"mixed" claims was "fairly slippery and would be difficult to apply." *Id.* at 39.

For the sake of all litigants, as well as courts themselves, rules governing preservation must be clear. There is no justification for building a rule of procedure on a distinction that provides no clear guidance and whose malleability practically invites capricious application. It is not difficult to preserve an issue for appeal by raising it at trial, *see* 9B Wright & Miller, Fed. Practice and Procedure § 2533 (3d ed. 2008), and there is no reason for this Court to craft an atextual and highly problematic appealability doctrine to rescue litigants who fail to do so.[3]

2. The failings of an amorphous "legal exception" are on full display in this case.

a. Although some States may treat contract interpretation as at least presumptively an issue of law for the court to resolve based on the four corners of the contract, California has taken a markedly different approach that routinely requires consideration of extrinsic evidence and requires juries to play a significant role. *See, e.g., City of*

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[3] A Rule 50 motion provides a convenient vehicle to ensure that legal errors are preserved for appeal. But a party may not always need to move for JMOL to preserve for appeal an argument that it was entitled to have an issue resolved in its favor as a matter of law. As Justice Kennedy noted at oral argument in *Ortiz*, there may be "cases in which the failure of the court to give a requested [jury] instruction preserves the issue, and perhaps [a Rule] 50(b) [motion] is not required there." Tr. 32. Respondents, however, affirmatively disavowed a jury instruction that would have had the court construe the contract for the jury. *See supra* at 7.

Hope, 43 Cal.4th at 395. California credits extrinsic evidence of custom and practice to such an extent that a contractual reference to "The United Kingdom" could include the independent Irish Free State if that is how the relevant industry used the term. *Ermolieff v. R.K.O. Radio Pictures*, 19 Cal.2d 543, 546, 549-50 (1942). The Ninth Circuit itself has recognized that, under California law, "the interpretation of contract terms . . . is typically a question of fact for the jury." *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1138 (9th Cir. 2001).

The court of appeals nonetheless justified its review of the denial of summary judgment on the ground that contract interpretation is a *legal* issue. App. 5a–8a. If that is true, it is true only in the trivial sense that whether the evidence presented at trial allows a reasonable fact-finder to find for a party is a "legal" issue. The Ninth Circuit had to review the competing evidence, including expert testimony on recording industry custom and practice, before it could conclude that there was a mistake of law. An unadorned challenge to the sufficiency of the evidence could equally be classified as a "legal" issue on the Ninth Circuit's approach. As this case demonstrates, the Ninth Circuit's test is infinitely malleable.

b. It is undeniable that the "legal" error found by the Ninth Circuit required an extensive review of the evidentiary record. If during that review the Ninth Circuit had found conflicts as to relevant industry custom and practice (as the district court did), the Ninth Circuit would have found no legal error in submitting the question to the jury. It is passing strange to classify an appellant's argument

as a "legal" one only if the court of appeals agrees with the appellant's view of the evidence. And making preservation turn on whether the court agrees with the merits of the argument in question hopelessly conflates preservation and the merits.

The extent of the court of appeals' overreaching in treating interpretation of the contract as a "legal" issue is demonstrated by the cases it relied on. The court cited *Wilson Arlington Co. v. Prudential Insurance Co.*, 912 F.2d 366, 371 (9th Cir. 1990), as an example of a case in which "we reversed the denial of a summary judgment motion after a jury trial because the contract in question was unambiguous as a matter of law." App. 6a. But *Wilson Arlington* was governed by *Virginia* law, which strictly excludes parol evidence. *See* 912 F.2d at 370. Indeed, the disparity between Virginia and California law was the theme of Judge Kozinski's opinion. The court lamented that California "permit[s] the introduction of extrinsic evidence to demonstrate the existence of an ambiguity even when the language of a contract is perfectly clear." *Id.* And the court went out of its way to note that if California law had applied, what was a question of law for the court under Virginia law would become an issue of disputed fact for the jury. *Id.*[4]

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[4] The court below also entirely misunderstood *Wolf v. Superior Court*, 114 Cal. App.4th 1343 (2004). The Ninth Circuit cited *Wolf* for the proposition that "whether an ambiguity exists is a question of law," App. 5a, but the court missed *Wolf*'s extended discussion about the relevance of industry custom, *id.* at 1354-59, and its holding that a summary judgment had to be reversed because the plaintiff's expert evidence "expose[d] the latent ambiguity in the contract language regarding the

In the Ninth Circuit's hands, therefore, the purported distinction between "law-based" and "fact-based" issues, *see Ortiz* Resp. Br. 18, proved to be no constraint at all. Even under the Ninth Circuit's mistaken view of California law, the court still reviewed the trial evidence before declaring that, under its view of the evidence, the interpretation of the contract was a question of law. *See* App. 7a (reviewing evidence to determine whether, "in light of the extrinsic evidence," contract was "reasonably susceptible" to petitioners' interpretation) (quotation omitted). Contrary to the *Ortiz* respondents' breezy claim that "at least seven circuits have shown no difficulty managing [such a distinction] in this context," Br. 15, the decision below is Exhibit A for the need for a clear rule.

c. The Ninth Circuit's mixing-and-matching of the summary judgment arguments and the trial record also confirms the danger of not adopting either a bright-line rule precluding appeals of summary judgment denials or a narrow exception for purely legal issues that do not require review of the evidentiary record. The court below ended up reviewing the denial of *summary judgment* based on the *trial record*. That is both incoherent and an inherent temptation created by the Ninth Circuit's rule. It is incoherent because if courts are truly evaluating the denial of summary judgment, only the summary judgment record should matter. The district court cannot be said to have erred by denying summary judgment based on evidence that was not

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industry's customary usage of the term" in dispute and the interpretation of the contract thus was for the jury. *Id.* at 1357.

before it. It is a temptation because it seems artificial to consider whether there is a material factual dispute on appeal after a full trial without considering the evidence adduced at trial. Apparently, the Sixth Circuit yielded to the same temptation in *Ortiz*. *See Ortiz* Tr. of Oral Arg. 6-10, 27-28. A clear preservation rule would eliminate that confusion by forcing parties to take proper steps to preserve legal issues at trial.

It is no answer to say that the trial record is "consistent" with the summary judgment record. Resp. CA9 Opp. to Mot. to Defer Submission 8 n.1. Even where the two records are not inconsistent, they almost certainly will be different. Summary judgment motions are decided on a paper record, without live testimony under cross-examination in court. When witnesses take the stand at trial, credibility takes on a much larger role. Even absent a direct contradiction between what witnesses said in declarations or depositions at summary judgment and what the witnesses say on the stand at trial, it is unrealistic to think that the records will be simply interchangeable. *See, e.g., Chesapeake Paper*, 51 F.3d at 1236. The standards for evaluating post-trial motions take these key differences into account by giving deference to the fact-finder.

As Justice Ginsburg observed at argument in *Ortiz*, even though Rule 56, Rule 50(a), and Rule 50(b) "all ask the same question," each rule "ask[s] it on the basis of a different record." Tr. 34. The arguments offered to justify appellate review of issues raised at summary judgment ignore that appellate courts do not review "issues" in the abstract, but rather *decisions* of lower courts. Each reviewable decision is a function of the legal

standard applicable at the procedural juncture at which it was made, as well as the arguments and evidence before the court at that time. This is elementary, but the mixing-and-matching approach of the Ninth Circuit and the Sixth Circuit makes clear that a permissive rule for the appeal of summary judgment denials invites confusion that can only result in an insufficient respect for the fact-finder's judgments.

If petitioners had moved to dismiss under Rule 12(b)(6), the "legal issue" would have been whether respondents' complaint stated a well-pleaded, plausible claim that the contract should be interpreted in their favor. A decision that respondents pleaded a valid claim would not have purported to address the interpretation of the contract through the prism of evidence under the summary judgment standard. Because the "record" and legal standards are different at the pleading and summary judgment stages, petitioners' Rule 12(b)(6) motion could not have preserved their Rule 56 argument.

Likewise, respondents' argument based on the summary judgment record could not preserve the distinct argument that respondents were entitled to JMOL based on the evidence presented at trial. The latter argument did not exist yet and so could be neither preserved nor ruled upon until the trial record itself was created. At least as to issues that depend on the evidentiary record, trial supersedes the denial of summary judgment by creating new decisions and a new record against which those decisions are to be judged. In keeping with the differing standards, parties also present evidence with different aims in opposing summary judgment

and at trial. At summary judgment the goal is to show the judge that there are genuine issues in dispute; at trial the goal is to persuade the jury that the party's position is correct. By definition, respondents' potential trial-stage argument — which they forfeited — would not merely have duplicated their unsuccessful summary judgment-stage argument.[5]

3. For these reasons, the most logical and workable rule is that a denial of summary judgment is not appealable after trial, even though arguments raised at summary judgment of course may be raised at trial and thus preserved for appeal. If this Court does not adopt that bright-line rule, it should adopt only a narrow exception for summary judgment arguments that are "purely legal" in the sense that they do not require any review of the evidentiary record. This is the approach that Justice Kennedy suggested at oral argument in *Ortiz*. Tr. 39-40 ("One way to make the formulation work is to say whether or not the issue depends on an assessment of the record.").

Some of the cases adopting a "legal" exception involved this kind of pure legal issue raised at summary judgment that had nothing to do with the evidence. *See, e.g., Banuelos*, 382 F.3d at 903 (permissibility of considering materials outside administrative record); *Gramercy Mills, Inc. v.*

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[5] The respondents in *Ortiz* deal with this problem by evading it with unexplained assertions that the Sixth Circuit reviewed the "issue" or "defense" of qualified immunity, as if that issue exists and is reviewable in the abstract, rather than through the prism of the record, arguments, and decision at a given stage where that issue was raised. *See Ortiz* Resp. Br. *passim*.

Wolens, 63 F.3d 569, 572 (7th Cir. 1995) (choice of law); *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995) (res judicata in light of prior administrative proceeding, which would be dispositive "no matter how much evidence Rekhi had").

An exception for legal errors, if not strictly cabined, risks being expanded to include run-of-the-mill mixed questions requiring review of the trial evidence. Accordingly, if this Court stops short of a bright-line rule that summary judgment denials are never appealable after trial, it is critical for the Court to limit any exception to issues that are purely legal in the sense of not requiring review of the evidence (at summary judgment or at trial).

C. In The Alternative, This Court Should Grant This Petition To Consider The Question Presented In *Ortiz*.

If this Court does not reach the question presented in *Ortiz* or answers that question on grounds specific to *Ortiz* or the qualified-immunity context, then the Court should grant this petition to address the fundamental question whether a party may appeal the denial of summary judgment following a trial on the merits.

The respondents in *Ortiz* suggested that the Sixth Circuit did not actually review a denial of summary judgment but instead considered the denial of (an unmade post-trial motion for) JMOL. *See* Tr. of Oral Arg. 27, 49. The respondents there moved for JMOL under Rule 50(a) but did not renew their motion under Rule 50(b) as required under *Unitherm Food System, Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). They argued, however, that

Ortiz forfeited a forfeiture argument based on *Unitherm* by failing to raise it in the Sixth Circuit. At oral argument, the question was raised whether *Ortiz* actually presents the summary-judgment appeal question on which certiorari was granted. *See* Tr. 6-8 (Alito, J.). Petitioners submit that *Ortiz* does present the fundamental question that this case raises. If the Court concludes otherwise, however, it should grant this petition.

By granting certiorari in *Ortiz*, this Court has already recognized the importance of the question and the lower courts' need for guidance. This petition does not suffer from any potential vehicle problems. The Ninth Circuit indisputably reviewed the denial of summary judgment; it explicitly acknowledged that respondents had not moved for JMOL and held that they did not have to do so. App. 5a. The Ninth Circuit's summary-judgment review was thus far from a mere "slip of the pen." *Ortiz* Tr. of Oral Arg. 6-8 (Alito, J.). In addition, petitioners clearly raised respondents' failure to move for JMOL, so there is no forfeiture-of-the-forfeiture issue here.

As explained above, the issue in *Ortiz* is hardly limited to the qualified-immunity context. If, however, the Court chooses to decide *Ortiz* on grounds specific to that context, the deep split and pervasive confusion on the more fundamental question will remain. Accordingly, if this Court's decision in *Ortiz* does not resolve the broader question presented by this case, this Court should grant this petition.

II. THIS COURT SHOULD SUMMARILY REVERSE THE NINTH CIRCUIT'S UNJUSTIFIED AND UNEXPLAINED OVERLOOKING OF RESPONDENTS' MULTIPLE FORFEITURES.

In the alternative, and even apart from *Ortiz*, the decision below warrants summary reversal. To interpret the contract in respondents' favor as a matter of law, the court below had to excuse multiple forfeitures. Worse, the court did so without even acknowledging those forfeitures, let alone offering a persuasive justification for departing from the rules that it routinely enforces. And the court did all this to invalidate a jury verdict and to reach an anomalous result.

1. The court of appeals never should have reviewed the denial of summary judgment because respondents did not request that relief in their appellate briefing. Respondents did not even hint at such a request until *six days* before oral argument in a Rule 28(j) letter. App. 56a. That letter was remarkable. It cited no new authority post-dating the briefing and offered no excuse for the sandbagging. Indeed, even that letter tiptoed around the issue rather than clearly stating that respondents sought to appeal the denial of summary judgment. Respondents did not openly confess that intent until oral argument itself. *See supra* at 9-10.

It is hard to imagine a clearer example of appellate forfeiture. Hundreds of litigants have sought to raise arguments belatedly only to see the Ninth Circuit enforce the usual forfeiture rules against them. One among countless representative examples is the Ninth Circuit's very recent decision

in *Christian Legal Society v. Wu*, 2010 WL 4629597 (Nov. 17, 2010), on remand from this Court. The court stated clearly that "[w]e review only issues [that] are argued specifically and distinctly in a party's opening brief," and refused to consider a belated argument. *Id.* at *1 (quotation omitted); *see also id.* at *3 (citing multiple Ninth Circuit cases).

Remarkably, the court here did not even mention the timing of respondents' request for review of the denial of summary judgment. After respondents made that request at oral argument, petitioners filed a Motion to Defer Submission in light of *Ortiz* that cited the Ninth Circuit's forfeiture precedent and argued that respondents' request was untimely. Respondents' opposition failed to offer any excuse for their delinquency. The court did not see fit to mention respondents' Rule 28(j) letter, petitioners' Motion to Defer Submission, or the extensive body of precedent declaring that arguments not raised squarely in a party's opening brief will not be considered. It is bad enough that the Ninth Circuit sanctioned respondents' sandbagging. It is far worse that the court did so by sweeping the forfeiture issue under the rug. If the court wished to depart from its forfeiture precedent, it at least owed the parties and the public an explanation.

2. Respondents' *appellate* forfeiture of their request for review of the denial of summary judgment is only the tip of the iceberg. Respondents also affirmatively waived the argument that the court should interpret the contract in their favor as a matter of law by explicitly disavowing an instruction interpreting the contract for the jury. And respondents reaffirmed that disavowal when they

told the Ninth Circuit as late as their reply brief that they were "*not* arguing that the judgment must be reversed and the case remanded for a new trial because the District Court erroneously submitted the contract interpretation question to the jury." Resp. CA9 Reply Br. 23.

Respondents could have requested a jury instruction that stated: "It is my job as judge to interpret the meaning of these agreements, and therefore, I will tell you what the recording agreements mean." App. 72a. The district court directly asked respondents' counsel whether that instruction was applicable. CA9 ER627. Respondents' counsel stated: "we believe 25A is not applicable." *Id.*

Despite explicitly disavowing that instruction, respondents sought a new trial on the ground that the court improperly submitted the contract's interpretation to the jury. The district court held that respondents had waived that argument by declining the instruction. App. 23a. Respondents contended that they had made their position clear at summary judgment and that it would have been futile to request the instruction given the court's prior rulings. App. 24a. As the district court concluded, however, respondents "never disputed the propriety of the Court's ruling on summary judgment, sought reconsideration of that decision, informed the Court that they believed it was error to submit the issue to the jury, or objected to the jury instructions." *Id.*

Given respondents' acquiescence to submitting the contract's interpretation to the jury — and respondents' reaffirmation of that acquiescence on

appeal — the Ninth Circuit should not have entertained their argument that the district court erred by refusing to interpret the contract in their favor as a matter of law at summary judgment. The district court is plainly in the best position to judge whether an argument was raised in substance at trial or whether it would have been otherwise improper or unnecessary to raise the argument at trial in light of earlier rulings. Whatever discretion district courts may have to take a flexible view of the requirement for a Rule 50 motion or a request for a jury instruction, where the district court explains that the argument was not before it at trial, the court of appeals is in a very poor position to second-guess the district court's on-the-ground view. Here, the Ninth Circuit did not deign even to mention the explanation the district court gave in denying respondents' motion for new trial, let alone provide a justification for overriding it.[6]

3. The Ninth Circuit's unwillingness to adhere to well-settled procedural rules is even more

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[6] Respondents' argument that it would have been futile to ask for an instruction interpreting the contract (or to move for JMOL) because the district court had definitively ruled, in denying both sides' summary judgment motions, that the jury would interpret the contract, *see* Resp. CA9 Br. 41-43, does not withstand scrutiny. Immediately after respondents disavowed this instruction, petitioners explained that whether the instruction would be applicable would depend on the outcome of their planned Rule 50(a) motion: "I think we are — it's our intention to make a motion at the close of the plaintiffs' case but — and pending — reserving our rights with respect to that motion, we would include it in the joint set." CA9 ER627. The district court understood and agreed to be "nimble" so that this instruction could be "add[ed] on the fly" if appropriate. *Id.*

egregious in light of the parties and nature of this case. This is the opposite end of the spectrum from a case involving a *pro se* litigant who needs the court's help or a manifest injustice that creates a temptation to overlook procedural defaults. Respondents are companies that have received millions of dollars under the contract in dispute. They were represented by a prominent law firm. They had no conceivable claim on the court's special indulgence. Yet the court gave respondents a special exception from the rules in order to reach a result that is, at best, anomalous.

When the parties entered into the disputed contract in 1998, iTunes and similar online distributors of music were beyond the horizon. Online retailers, however, are the heirs to brick-and-mortar record stores, and downloads are simply the latest configuration for "records." For that reason, the parties agreed that online distributors are "normal retail channels" that sell "records." *See* Resp. CA9 Reply Br. 4. Those undisputed facts would naturally bring downloads within the "Records Sold" provision, which has applied through multiple format changes over the years and is the central, basic provision for the calculation of royalties for recordings sold through "normal retail channels."

By contrast, the parties strongly disputed whether the "Masters Licensed" provision had any application to a record company's sale of its own records, whether in download format or otherwise. The text of that provision concerns third-party uses, and a subsequent amendment to the contract clarified that the provision applied only to those types of "ancillary uses." App. 66a–68a. In denying respondents' new trial motion, the district court

summed up the disputed evidence of industry custom. According to the court, respondents' expert testified that the Masters Licensed provision customarily applied "to every transaction involving a license, and that the presence of 'indicia' of a license was the end of the inquiry." App. 26a. Petitioners' expert testified, in contrast, that the "provision customarily applies only when recordings are incorporated into a third party's products." *Id.* The court concluded that those differing views presented a material evidentiary dispute because "both versions of the accepted recording industry practice could not be true." App. 26a.

On summary judgment or in evaluating even a preserved challenge to the verdict on appeal, petitioners' evidence concerning industry practice had to be taken as true. Yet the court of appeals disregarded the Records Sold provision as immaterial, despite agreement that its language comfortably covered permanent downloads, and concluded that the Masters Licensed provision unambiguously applied — despite contrary evidence of industry practice, the parties' own course of dealing, and amendments that identified permanent downloads with the Records Sold provision while confirming the ancillary, specialized nature of the Masters Licensed provision.

At the very least, it is an odd conclusion that the parties agreed to buck industry practice by treating ordinary sales through normal retail channels in one configuration under a different royalty provision from that applied to sales in all other configurations. Even if the jury could have credited respondents' interpretation, that interpretation is plainly not so obviously correct that a court should have been

tempted to ignore all manner of procedural defaults in order to reach it.

CONCLUSION

The petition for certiorari should be granted or held pending resolution of *Ortiz v. Jordan*, No. 09-737. In the alternative, this Court should summarily reverse the Ninth Circuit's judgment.

Respectfully submitted,

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December 2010

APPENDIX

APPENDIX

TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the Ninth Circuit, dated Sept. 3, 2010 ..... 1a

Order of the United States District Court for the Central District of California Denying Plaintiffs' Motion for New Trial, dated May 12, 2009 ..... 16a

Order of the United States District Court for the Central District of California Denying Plaintiffs' Motion for Summary Judgment, dated Jan. 20, 2009 ..... 34a

Order of the United States Court of Appeals for the Ninth Circuit Denying Appellees' Motion to Defer Submission, dated Aug. 2, 2010 ..... 52a

Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing En Banc, dated Oct. 21, 2010 ..... 53a

Constitutional and Statutory Provisions Involved 54a

Respondents' Letter to the Court of Appeals Pursuant to Fed. R. App. P. 28(j), dated July 6, 2010 ..... 56a

Excerpts from Trial Exhibit 5 (Mar. 9, 1998 Agreement), CA9 ER 837-846 ..... 58a

Excerpts from Trial Exhibit 9 (Sept. 27, 2000 Novation), CA9 ER 879-883 ..... 65a

Excerpt from Trial Exhibit 17 (Nov. 1, 2004), CA9 ER 1011 ..... 69a

Proposed Jury Instruction 25 (A), CA9 ER 422 ..... 72a

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 09-55817, 09-56069

F.B.T. PRODUCTIONS, LLC; EM2M, LLC,

Plaintiffs-Appellants,

v.

AFTERMATH RECORDS, DBA AFTERMATH ENTERTAINMENT; INTERSCOPE RECORDS; UMG RECORDING, INC.; ARY, INC.,

Defendants-Appellees.

Argued & Submitted July 12, 2010
Pasadena, California
Filed September 3, 2010

Before: Jerome FARRIS, Cynthia Holcomb HALL and Barry G. SILVERMAN,*Circuit Judges.*

OPINION

SILVERMAN, *Circuit Judge*:

This dispute concerns the percentage of royalties due to Plaintiffs F.B.T. Productions, LLC, and Em2M, LLC, under their contracts with Defendant Aftermath in connection with the recordings of

Marshal B. Mathers, III, professionally known as the rap artist Eminem.[1] Specifically, F.B.T. and Aftermath disagree on whether the contracts' "Records Sold" provision or "Masters Licensed" provision sets the royalty rate for sales of Eminem's records in the form of permanent downloads and mastertones. Before trial, F.B.T. moved for summary judgment that the Masters Licensed provision unambiguously applied to permanent downloads and mastertones. The district court denied the motion. At the close of evidence, F.B.T. did not move for judgment as a matter of law, and the jury returned a verdict in favor of Aftermath. On appeal, F.B.T. reasserts that the Masters Licensed provision unambiguously applies to permanent downloads and mastertones. We agree that the contracts are unambiguous and that the district court should have granted summary judgment to F.B.T. We therefore reverse the judgment and vacate the district court's order awarding Aftermath its attorneys' fees.

BACKGROUND

F.B.T. signed Eminem in 1995, gaining exclusive rights to his recordings. In 1998, F.B.T. signed an agreement transferring Eminem's exclusive recording services to Aftermath. The "Records Sold" provision of that agreement provides that F.B.T. is to receive between 12% and 20% of the adjusted retail price of all "full price records sold in the United States . . . through normal retail channels." The

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[1] This case involves multiple Plaintiffs and Defendants. For ease of reference, we refer to Plaintiffs collectively as F.B.T. and to Defendants collectively as Aftermath.

agreement further provides that "[n]otwithstanding the foregoing," F.B.T. is to receive 50% of Aftermath's net receipts "[o]n masters licensed by us . . . to others for their manufacture and sale of records or for any other uses." The parties refer to this provision as the "Masters Licensed" provision. The contract defines "master" as a "recording of sound, without or with visual images, which is used or useful in the recording, production or manufacture of records." The agreement does not contain a definition of the terms "licensed" or "normal retail channels."

In 2002, Aftermath's parent company, Defendant UMG Recordings, Inc., concluded an agreement with Apple Computer, Inc., that enabled UMG's sound recordings, including the Eminem masters, to be sold through Apple's iTunes store as permanent downloads. Permanent downloads are digital copies of recordings that, once downloaded over the Internet, remain on an end-user's computer or other device until deleted. The contract between UMG and Apple is but one example of the many agreements that Aftermath has concluded to sell sound recordings in digital formats since approximately 2001. Since 2003, Aftermath has also concluded contracts with major cellular telephone network carriers to sell sound recordings as mastertones, which are short clips of songs that can be purchased by users to signal incoming calls, popularly known as ringtones.

In 2003, F.B.T. and Aftermath entered into a new agreement that terminated the 1998 agreement. The 2003 agreement increased some royalty rates, but incorporated the wording of the Records Sold and

Masters Licensed provisions from the 1998 agreement. In 2004, the parties amended the agreement to provide that "Sales of Albums by way of permanent download shall be treated as [U.S. Normal Retail Channel] Net Sales for the purposes of escalations." Escalations are increases in the royalty rate when total album sales surpass certain targets. The amendment further provides, "Except as specifically modified herein, the Agreement shall be unaffected and remain in full force and effect."

F.B.T. brought suit after a 2006 audit showed that Aftermath had been applying the Records Sold provision to calculate the royalties due to F.B.T. for sales of Eminem's recordings in the form of permanent downloads and mastertones. Before trial, F.B.T. moved for summary judgment that the Masters Licensed provision unambiguously applied to those sales. Aftermath cross-moved for summary judgment. It argued, in part, that the 2004 amendment showed that the parties intended the Records Sold provision to apply to permanent downloads.

After provisionally reviewing the undisputed extrinsic evidence, the district court concluded that the agreements were reasonably susceptible to either party's interpretation and denied both motions for summary judgment. At trial, only Aftermath moved for judgment as a matter of law at the close of the evidence. The court denied the motion. The jury returned a verdict in favor of Aftermath, and the district court awarded Aftermath its attorneys' fees of over $2.4 million. F.B.T. timely appealed the district court's final judgment and award of

attorneys' fees. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we reverse.

DISCUSSION

I. F.B.T. Is Not Precluded from Arguing that the Masters Licensed Provision Unambiguously Applies to Permanent Downloads and Mastertones.

[1] F.B.T. did not file a pre-verdict motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50, so it has not preserved "a challenge to the sufficiency of the evidence to support the verdict" in this case. *Nitco Holding Corp. v. Boujikian*, 491 F.3d 1086, 1089 (9th Cir. 2007). However, F.B.T.'s argument that the contracts are unambiguous raises an issue of law that does not rest on the sufficiency of the evidence to support the jury's verdict. *See Wolf v. Superior Court*, 8 Cal. Rptr. 3d 649, 656 (Ct. App. 2004) ("The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal."). F.B.T. therefore did not have to present that argument in a motion for judgment as a matter of law. Rather, F.B.T. had to raise the argument at some point before the judge submitted the case to the jury, which it did. *See Cochran v. City of L.A.*, 222 F.3d 1195, 1200 (9th Cir. 2000) (holding that an issue of law that "does not concern the sufficiency of the evidence presented to the jury" need not be raised in a motion for judgment as a matter of law to preserve the issue for appeal); *Landes Constr. Co. v. Royal Bank of Can.*, 833 F.2d 1365, 1370 (9th Cir. 1987) ("As long as a party properly raises an issue of law before the case goes to the jury, it need not

include the issue in a motion for a directed verdict in order to preserve the question on appeal.").

F.B.T. argued that the contract was unambiguous in its motion for summary judgment, and the district court denied the motion. A district court's denial of summary judgment is subject to review on appeal, despite full trial on the merits, "where the district court made an error of law that, if not made, would have required the district court to grant the motion." *Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004) (citing *Pavon v. Swift Transp. Co., Inc.*, 192 F.3d 902, 906 (9th Cir. 1999)). For example, in *Wilson Arlington Co. v. Prudential Insurance Co.*, 912 F.2d 366, 370-71 (9th Cir. 1990), we reversed the denial of a summary judgment motion after a jury trial because the contract in question was unambiguous as a matter of law. *Accord King v. PA Consulting Group, Inc.*, 485 F.3d 577, 589 (10th Cir. 2007) (holding that despite the absence of a motion for judgment as a matter of law, "King adequately preserved the purely legal question of whether the Agreement is ambiguous by raising the matter in his trial brief"); *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-20 (7th Cir. 2003) (reviewing a district court's conclusion on summary judgment that a contract was ambiguous despite the absence of a motion for judgment as a matter of law at trial); *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1189-90 (8th Cir. 1999) (same).

Just as in *Wilson*, we may review the district court's determination that the contracts in this case are ambiguous. Under California law, "[t]he language of a contract is to govern its interpretation,

if the language is clear and explicit, and does not involve an absurdity." Cal. Civ. Code § 1638. Parol evidence is properly admitted to construe a contract only when its language is ambiguous.

> The decision whether to admit parol evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract.

Winet v. Price, 6 Cal. Rptr. 2d 554, 557 (Ct. App. 1992). Despite the trial court's provisional review of extrinsic evidence, its determination of whether an ambiguity exists remains "a question of law, subject to independent review on appeal." *Wolf*, 8 Cal. Rptr. at 656; *see also City of Hope Nat'l Med. Ctr. v. Genetech, Inc.*, 181 P.3d 142, 156 (Cal. 2008) (stating that contract interpretation is a question of law for the court "when it is based on the words of the instrument alone [or] when there is no conflict in the extrinsic evidence").

[2] Here, F.B.T. moved for summary judgment that the Masters Licensed provision unambiguously applied to permanent downloads and mastertones. The district court denied F.B.T.'s motion because it determined that the agreements were reasonably susceptible to Aftermath's contrary interpretation

that the Records Sold provision applied. That determination was on a "question of law," *Wolf*, 8 Cal. Rptr. 3d at 656, that if decided in F.B.T.'s favor "would have required the district court to grant the [summary judgment] motion," *Banuelos*, 382 F.3d at 902. We may therefore review the district court's denial of summary judgment despite full trial on the merits.

II. The District Court Erred in Determining that the Contracts Were Ambiguous.

[3] Turning to the agreements in question, the Records Sold provision contains the royalty rate for "full price records sold in the United States . . . through normal retail channels." On summary judgment, Aftermath argued that the Records Sold provision applied because permanent downloads and mastertones are records, and because iTunes and other digital music providers are normal retail channels in the United States.

[4] However, the agreements also provide that "notwithstanding" the Records Sold provision, F.B.T. is to receive a 50% royalty on "masters licensed by [Aftermath] . . . to others for their manufacture and sale of records or for any other uses." The parties' use of the word "notwithstanding" plainly indicates that even if a transaction arguably falls within the scope of the Records Sold provision, F.B.T. is to receive a 50% royalty if Aftermath licenses an Eminem master to a third party for "any" use. A contractual term is not ambiguous just because it is broad. Here, the Masters Licensed provision explicitly applies to (1) masters (2) that are licensed to third parties for the manufacture of records "or for any other uses,"

(3) "notwithstanding" the Record Sold provision. This provision is admittedly broad, but it is not unclear or ambiguous.

[5] Accordingly, to determine whether the Masters Licensed provision applies, we must decide whether Aftermath licensed the Eminem masters to third parties. Aftermath argues that there was no evidence that it or F.B.T. used the term "licensed" in a technical sense. *See* Cal. Civ. Code § 1644 ("The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense . . . ."). In the ordinary sense of the word, a license is simply "permission to act." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1304 (2002). Aftermath did not dispute that it entered into agreements that permitted iTunes, cellular phone carriers, and other third parties to use its sound recordings to produce and sell permanent downloads and mastertones. Those agreements therefore qualify as licenses under Aftermath's own proposed construction of the term.

[6] The conclusion that Aftermath licensed the Eminem masters to third parties also comports well with and finds additional support in federal copyright law. When one looks to the Copyright Act, the terms "license" and "sale" have well differentiated meanings, and the differences between the two play an important role in the overall structures and policies that govern artistic rights. For example, under the language of the Act and the Supreme Court's interpretations, a "sale" of a work may either be a transfer in title of an individual copy of a work, or a sale of all exclusive intellectual

property rights in a work. *See* 17 U.S.C. § 109 (describing the "first sale" doctrine); *Quality King Distribs. v. L'Anza Research Int'l*, 523 U.S. 135, 145 (1998) (describing the transfer of an individual copy of a work as a sale); *see also* 3-10 NIMMER ON COPYRIGHT § 10.02 (2009) (describing a transfer of all ownership in a copyright as a sale).

[7] There is no dispute that Aftermath was at all relevant times the owner of the copyrights to the Eminem recordings at issue in this case, having obtained those rights through the recording contracts in exchange for specified royalty payments. Pursuant to its agreements with Apple and other third parties, however, Aftermath did not "sell" anything to the download distributors. The download distributors did not obtain title to the digital files. The ownership of those files remained with Aftermath, Aftermath reserved the right to regain possession of the files at any time, and Aftermath obtained recurring benefits in the form of payments based on the volume of downloads.

Much as Section 109 describes a "sale" under the "first sale" doctrine, various other sections of the Copyright Act illuminate the meaning of the term "license." For example, section 114(f), titled "Licenses for Certain Nonexempt Transmissions," describes the statutory authorization for a third party to exercise public performance rights that otherwise remain the exclusive rights of a copyright holder and defines this authorization as a "license." 17 U.S.C. § 114(f); *see also* 17 U.S.C. §§ 111(a), 114(d)(2). Section 115, titled "Scope of Exclusive Rights in Nondramatic Musical Works: Compulsory License for Making and Distributing Phonorecords," refers directly to the

statutory authorization for artists to exercise the copyright owner's right to make and distribute phonorecord "covers" as a license, but again makes it clear that title remains with the copyright owner. 17 U.S.C. § 115.

[8] Under our case law interpreting and applying the Copyright Act, too, it is well settled that where a copyright owner transfers a copy of copyrighted material, retains title, limits the uses to which the material may be put, and is compensated periodically based on the transferee's exploitation of the material, the transaction is a license. *See, e.g., Wall Data Inc. v. Los Angeles County Sheriff's Dep't*, 447 F.3d 769, 785 (9th Cir. 2006); *MAI Sys. Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993); *United States v. Wise*, 550 F.2d 1180, 1190-91 (9th Cir. 1977); *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 103 (9th Cir. 1960).

It is easily gleaned from these sources of federal copyright law that a license is an authorization by the copyright owner to enable another party to engage in behavior that would otherwise be the exclusive right of the copyright owner, but without transferring title in those rights. This permission can be granted for the copyright itself, for the physical media containing the copyrighted work, or for both the copyright and the physical media.

[9] When the facts of this case are viewed through the lens of federal copyright law, it is all the more clear that Aftermath's agreements with the third-party download vendors are "licenses" to use the Eminem master recordings for specific purposes authorized thereby—i.e., to create and distribute

permanent downloads and mastertones—in exchange for periodic payments based on the volume of downloads, without any transfer in title of Aftermath's copyrights to the recordings. Thus, federal copyright law supports and reinforces our conclusion that Aftermath's agreements permitting third parties to use its sound recordings to produce and sell permanent downloads and mastertones are licenses.

[10] Furthermore, the sound recordings that Aftermath provided to third parties qualify as masters. The contracts define a "master" as a "recording of sound . . . which is used or useful in the recording, production or manufacture of records." Aftermath admitted that permanent downloads and mastertones are records. The sound recordings that Aftermath supplied to third parties were "used or useful" in the production of permanent downloads and mastertones, so those sound recordings were masters. Because Aftermath permitted third parties to use the Eminem masters to produce and sell records, in the form of permanent downloads and mastertones, F.B.T. is entitled to a 50% royalty under the plain terms of the agreements.

Aftermath argues that the 2004 amendment to the agreements clarified that the Records Sold provision sets the royalty for permanent downloads. However, the 2004 amendment states only that albums sold as permanent downloads are to be counted "for purposes of escalations" under the Records Sold provision, and that "[e]xcept as specifically modified herein, the Agreement shall be unaffected and remain in full force and effect." Read in context, the plain language of the amendment

provides that sales of permanent downloads by third parties count towards escalations on the royalty owed when Aftermath itself sells records through normal retail channels. It does not state, and in no way implies, that the royalty rate for the sale of the permanent downloads by third parties is set by the Records Sold provision.

Nor did any of the evidence regarding industry custom or the parties' course of performance support Aftermath's interpretation that the Records Sold provision applies. Aftermath's expert explained that the Masters Licensed provision had in the past been applied "only to compilation records and incorporation into movies, TV shows, and commercials." It was, however, undisputed that permanent downloads and mastertones only came into existence from 2001 to 2003. Consequently, the fact that the Masters Licensed provision had never previously been applied to those forms of licensing is immaterial. There is no indication that the parties intended to confine the contract to the state of the industry in 1998. To the contrary, the contract contemplated advances in technology. It provided that Aftermath had the right to exploit the "masters in any and all forms of media now known and hereinafter developed." Aftermath's evidence of how the Masters Licensed provision had been applied in the past therefore did not cast doubt on its application to permanent downloads and mastertones.

[11] Furthermore, Aftermath renewed its agreement with F.B.T. in 2003, by which time permanent downloads and mastertones were coming into existence. Aftermath argued that subsequent to

renewal, F.B.T. had "never objected to Defendants' payment of royalties under the Records Sold provision until the auditor raised the issue in 2006." However, Aftermath provided no evidence that F.B.T. knowingly acquiesced to payment under the Records Sold provision between 2003 and 2006. It showed that F.B.T. had received statements that included royalties for permanent downloads and mastertones, but it was uncontroverted that F.B.T. did not audit those royalty statements until 2006. F.B.T. had no obligation to audit the statements any earlier than it did, and it immediately raised the issue with Aftermath after the audit. Accordingly, Aftermath cannot use F.B.T.'s lack of objection to payments made before 2006 to prove how it interpreted the agreements. *See Barnhart Aircraft, Inc. v. Preston*, 297 P. 20, 22 (Cal. 1931) (holding that a party's acts can be used to construe its interpretation of an agreement only where such acts were "direct, positive and deliberate and . . . done in an attempted compliance with the terms of the contract or agreement"). The undisputed extrinsic evidence provisionally reviewed by the district court therefore did not support Aftermath's interpretation that the Records Sold provision applies.

[12] In sum, the agreements unambiguously provide that "notwithstanding" the Records Sold provision, Aftermath owed F.B.T. a 50% royalty under the Masters Licensed provision for licensing the Eminem masters to third parties for any use. It was undisputed that Aftermath permitted third parties to use the Eminem masters to produce and sell permanent downloads and mastertones. Neither the 2004 amendment nor any of the parole evidence

provisionally reviewed by the district court supported Aftermath's interpretation that the Records Sold provision applied. Because the agreements were unambiguous and were not reasonably susceptible to Aftermath's interpretation, the district court erred in denying F.B.T. summary judgment.

The judgment in favor of Aftermath is REVERSED, the district court's order granting Aftermath its attorneys' fees is VACATED, and the case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3314 PSG (MANx)

F.B.T. PRODUCTIONS, LLC, ET AL.,

Plaintiffs,

v.

AFTERMATH RECORDS, ET AL.,

Defendants.

Filed May 12, 2009

Before: The Honorable Philip S. GUTIERREZ, United States District Judge; Wendy K. Hernandez, Deputy Clerk

CIVIL MINUTES - GENERAL

PROCEEDINGS: (In Chambers) Order Denying Plaintiffs' Motion for New Trial

Before the Court is Plaintiffs' motion for a new trial and relief from judgment on Counts 1 and 3. After considering the moving and opposing papers, as well as oral argument heard on May 11, 2009, the Court DENIES the motion.

I. Background

Plaintiffs F.B.T. Productions, LLC ("FBT") and Em2M, LLC are entities that receive royalties payable for the use and exploitation of master recordings by Marshall B. Mathers III, better known as the rapper Eminem. Defendants are Aftermath Records ("Aftermath"), a joint venture, and its owners, Interscope Records, UMG Recordings, Inc., and Ary, Inc. The primary question presented by this case is what royalty is due Plaintiffs when a consumer downloads an Eminem song to her computer or purchases an Eminem ringtone for her mobile phone.

A. The Eminem Agreements

In approximately 1995, Jeff and Mark Bass signed Eminem to an exclusive record deal with FBT, their production company. On March 9, 1998, FBT entered into an agreement ("the 1998 Agreement") to furnish Eminem's recordings to Aftermath. The 1998 Recording Agreement contains two royalty provisions. First, paragraph 4(a) sets a royalty for "full-price records sold in the United States" that varies between 12 and 20% (the "Records Sold" provision).[1] "Records" are defined as "all forms of reproductions, whether embodying sound alone or sound together with visual images, manufactured or distributed primarily for home use."

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[1] According to Defendants, the artist's basic royalty rate varies with the artist's popularity. The 1998 Agreement provides for "escalations," meaning that the royalty rate increases as certain sales targets are met.

Second, paragraph 4(c)(v) of the 1998 Agreement states that "[o]n masters licensed by us . . . to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from other uses of the masters" ("the Masters Licensed" provision). A "master" is defined as "a recording of a sound, without or with visual images, which is used or useful in the recording, production or manufacture of records." In 2000, the parties to the 1998 Agreement entered into a novation that established a direct contractual relationship between Eminem and Aftermath ("the 2000 Novation"). The 2000 Novation transferred the obligation to provide Aftermath with Eminem's recording services from FBT directly to Eminem. FBT became a "passive income participant," retaining a right to royalty income from Eminem's recordings. Aftermath agreed to render separate accountings to FBT and Eminem, and the 2000 Novation specified the royalty share of each.

In 2003, Aftermath and Eminem entered into a new recording contract, which terminated the 1998 Agreement ("the 2003 Agreement"). Plaintiffs retained the right to receive royalties on Eminem's recordings under the 2003 Agreement. The structure of the 2003 Agreement was similar to the 1998 Agreement, but included an increased advance and higher royalties reflecting Eminem's rise to stardom. Like the 1998 Agreement, the 2003 Agreement set forth two royalty rates, one for "records sold," and one for "masters licensed . . . to others for their manufacture and sale of records or for any other uses."

In November 2004, the parties entered into the "2004 Amendment," which altered the 2003 Agreement to increase the advance for an upcoming LP, the fraction of FBT's passive income participation, and certain royalty rates.

B. UMG's Agreements with Third Party Digital Media Providers

Since approximately 2001, UMG has entered into agreements with various third parties granting those entities rights to distribute music to consumers over the internet in various forms, including permanent downloads. Permanent downloads are digital copies of recordings that, once downloaded, remain permanently on an end-user's computer, iPod, or other hardware device.[2] Apple's iTunes music store, which launched in 2003, quickly became the largest source of legal permanent downloads.

In approximately 2003, UMG began entering into contracts with major cellular telephone network carriers, including Sprint, Nextel, Cingular, and T-Mobile, to provide UMG recordings for use on mobile phones as mastertones. "Mastertones" is a term that refers to more than one type of digital media; most

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[2] In contrast, the "streaming" of music allows a user to listen to a song online, but no copy is created on her local machine. A consumer can only listen to a streamed song contemporaneously with its transmission; it is not possible to listen to the song again without reconnecting to the provider. "Conditional downloads" are a form of download restricted such that a user must maintain a subscription to a given service in order to continue to listen to the downloaded songs.

commonly, mastertones are short clips of a song that play on a cellular phone to signal an incoming call. Typically, the user permanently downloads the mastertone onto her mobile device.

In 2005, FBT and Eminem hired an accounting firm to audit Defendants' accounting records for the period beginning January 1, 2002 and ending June 30, 2005. The audit revealed that UMG was paying Plaintiffs royalties for permanent downloads and mastertones based on the rate set forth in the "Records Sold" provision of the Eminem Agreements. Based on Plaintiffs' belief that royalties on permanent downloads and mastertones should be paid at the higher rate set forth in the "Masters Licensed" provision, the auditor calculated that Defendants had underpaid Plaintiffs by at least $650,000. Defendants responded to the audit report in a letter dated May 8, 2007, contesting the determination that certain royalties had been underpaid.

C. Procedural History

On May 21, 2007, Plaintiffs filed a complaint for breach of contract and declaratory judgment based on Defendants' alleged underpayment of royalties for digital uses of Eminem's recordings. On March 6, 2008, Plaintiffs filed a second lawsuit for breach of contract and declaratory judgment, also claiming that Defendants had failed to properly account and pay royalties due to Plaintiffs. *See F.B.T. Productions, LLC, et al. v. Aftermath Records, et al.*, No. CV 08-1563 PSG (CWx). The Court consolidated the two actions on May 19, 2008 and ordered Plaintiffs to file an amended complaint. Plaintiffs did

so and later filed a second amended complaint ("SAC"), which asserted two counts for breach of contract and a third count for declaratory relief. On January 20, 2009, the Court denied the parties' cross-motions for summary judgment.

D. Jury Trial

Trial commenced on February 20, 2009, and the case was submitted to the jury on March 5, 2009. The jury returned a verdict in favor of Defendants on Counts 1 and 3 and in favor of Plaintiffs on Count 2. The Court entered final judgment on March 17. Plaintiffs now move for a new trial on Counts 1 and 3 on several grounds.

II. Legal Standard

After a jury trial, the court may grant a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Fed. R. Civ. P. 59(a)(1)(A). Such a motion may be granted if the jury's verdict is against the clear weight of the evidence. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007). There is no clear formulaic test for determining whether this standard has been met. However, the Ninth Circuit has explained that a judge should not set aside a jury verdict absent a "definite and firm conviction that a mistake has been committed by the jury." *Landes Constr. Co., Inc. v. Royal Bank of Canada*, 833 F.2d 1365, 1372 (9th Cir. 1987).

Additionally, a new trial is warranted if an erroneous evidentiary ruling substantially prejudiced a party. *Ruvalcaba v. City of Los Angeles*, 64 F.3d

1323, 1328 (9th Cir. 1995). Erroneous jury instructions and the failure to give adequate instructions are also grounds for a new trial, unless the error was harmless. *Murphy v. City of Long Beach*, 914 F.2d 183, 1990 (9th Cir. 1990); Robert E. Jones, et al., Federal Civil Trials & Evidence § 20:242 (The Rutter Group 2008).

III. Discussion

Plaintiffs argue that several grounds entitle them to a new trial: (1) the Court improperly submitted the task of interpreting the Eminem Agreements to the jury; (2) the Court should have determined, as a matter of law, that the third-party agreements are licenses, or, at a minimum, instructed the jury on this issue; (3) the jury's verdict was against the clear weight of the evidence; and (4) several evidentiary errors severely prejudiced Plaintiffs. The Court will address each argument in turn.

A. Submission of Contract Interpretation to the Jury

Plaintiffs first argue that the Court should have interpreted the Eminem Agreements as a matter of law. According to Plaintiffs, the Court erred in submitting this issue to the jury because there were no material extrinsic facts in dispute.

Plaintiffs waived this argument by failing to raise it prior to submission of the case to the jury. Before trial, the parties submitted a jury instruction entitled, "NO CONFLICT IN EXTRINSIC EVIDENCE - COURT INTERPRETS CONTRACT." The instruction, No. 25A, required the Court to tell

the jury what the recording agreements meant. The parties included a note, stating that the agreement was only to be given if the Court found that any of the disputed contractual provisions were not "reasonably susceptible" to the parties' competing interpretations. Before the final day of testimony, the Court held a conference with the parties to finalize the jury instructions. At that time, in response to the Court's question, "Is 25A not applicable?," Plaintiffs' counsel stated, "[W]e believe 25A is not applicable." 3/2/09 Transcript (Docket No. 500) 14:6-16. Because Plaintiffs failed to object to the jury instructions, they waived any claim that the Court erred by failing to interpret the contracts as a matter of law. *See McClaran v. Plastic Indus., Inc.*, 97 F.3d 347, 360 (9th Cir. 1996); *Beech Aircraft Corp. v. United States*, 51 F.3d 834, 841 (9th Cir. 1995) (Plaintiffs waived argument that district court erred in allocating burden of proof by failing to raise it until post-trial motion); *Porterco, Inc. v. Igloo Prods. Corp.*, 955 F.2d 1164, 1173 (8th Cir. 1992) ("Once the District Court had expressed its intention to send the issues . . . to the jury, it was incumbent upon Igloo to call the court's attention to any incipient error.").

Plaintiffs argue that a formal objection was not required because the Court previously denied their motion for summary judgment. The Court recognizes that "the failure to object to an instruction may be disregarded if the party's position previously has been made clear to the trial judge and it is plain that a further objection would be unavailing." 9C C. Wright, et al., *Federal Practice and Procedure* § 2553 (2008). Plaintiffs also point to *Medtronic, Inc. v. White*, 526 F.3d 487, 495 (9th Cir. 2008). In

Medtronic, the Ninth Circuit held that a party had not waived its challenge to jury instructions where counsel stated, "I think that's fine" after the trial court read the disputed instructions because the court was aware of the party's objections and a further objection would have been futile. *Id.* at 495-96.

Here, however, Plaintiffs never disputed the propriety of the Court's ruling on summary judgment, sought reconsideration of that decision, informed the Court that they believed it was error to submit the issue to the jury, or objected to the jury instructions. Plaintiffs suggest that simply because the Court declined to grant summary judgment, any further objection would have been futile. However, Plaintiffs have cited no authority to support this proposition. Further, the fact that the Court dealt with No. 25A by asking the parties a question—rather than definitively ruling that it would not give the instruction—undermines Plaintiffs' assumption that objection would have been futile. As a matter of fairness, Plaintiffs cannot remain silent during trial and claim error only in the face of an unfavorable verdict. Rather, parties ought "to bring possible errors to light while there is still time to correct them without entailing the cost, delay and expenditure of judicial resources occasioned by retrials." *Monsma v. Cent. Mut. Ins. Co.*, 392 F.2d 49, 52 (9th Cir. 1968) (citation omitted) (discussing failure to object to jury instruction); *see also Beech Aircraft*, 51 F.3d at 841.

Furthermore, while Plaintiffs have cast their motion as one for a new trial, their briefs repeatedly assert that the Court should interpret the Eminem Agreements, as a matter of law, in Plaintiffs' favor.

This is, in essence, a request for judgment as a matter of law. However, Plaintiffs did not move for JMOL at the close of evidence. Accordingly, the relief that Plaintiffs seek is not available. *See, e.g., Janes v. Wal-Mart Stores Inc.*, 279 F.3d 883, 886-888 (9th Cir. 2002). Under Ninth Circuit precedent, Plaintiffs' motion for summary judgment and trial brief do not satisfy the requirement that they bring a preverdict motion for JMOL. *Id.* at 886-87.

Next, assuming that Plaintiffs did not waive this argument, the Court did not err when it submitted the issue to the jury. Under California law, when the intent of the parties "depends upon the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." *City of Hope Nat'l Med. Ctr. v. Genetech, Inc.*, 43 Cal. 4th 375, 395, 75 Cal. Rptr. 3d 333 (2008). Plaintiffs contend that it is only the province of the jury to resolve conflicts in "foundational extrinsic evidence" or historic facts. A recent case, *Wolf v. Sup. Ct.*, 114 Cal. App. 4th 1343, 8 Cal. Rptr. 3d 649 (2004), which the Court cited in its order on the parties' motions for summary judgment, is strikingly similar to the case at bar and confutes Plaintiffs' unduly narrow conception of the jury's role. *Wolf* involved a dispute over the meaning of the contractual term "gross receipts." Neither side presented any direct evidence of the negotiating parties' understanding of the term at the time they entered into the contract. *Id.* at 1359-60. The parties offered extrinsic evidence of industry custom and usage, which revealed that "gross receipts" was reasonably susceptible to more than one possible meaning. *Id.* at 1350, 1353-1355.

The Court of Appeal vacated the trial court's entry of summary judgment, holding that conflicting expert testimony regarding industry custom and usage raised a triable issue of fact. *Id.* at 1354-55.

Similarly, in the instant case, there was no direct evidence of the parties' expressed intent at the time of contractual negotiations. Accordingly, the Court had to look to extrinsic evidence. As explained in the Court's order denying summary judgment, Plaintiffs failed to establish that industry custom and practice mandated a particular interpretation of the Masters Licensed provision. Instead, the parties' conflicting evidence created a triable issue of fact.

At trial, the parties presented conflicting expert testimony, and it was the task of the jury to resolve the factual conflict by assessing the credibility of the witnesses. For instance, David Berman, Plaintiffs' expert, testified that the custom and practice in the recording industry was to apply the "masters licensed" provision to every transaction involving a license, and that the presence of "indicia" of a license was the end of the inquiry. In contrast, Jeffrey Harleston, Defendants' expert, testified that the "masters licensed" provision customarily applies only when recordings are incorporated into a third party's products. Although Plaintiffs maintain that no material extrinsic evidence was disputed, both versions of the accepted recording industry practice could not be true.[3]

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[3] Indeed, Plaintiffs implicitly acknowledge the existence of conflicting expert testimony and the significance of credibility

(Continued...)

In sum, conflicting extrinsic evidence precluded the Court from interpreting the Eminem Agreements as a matter of law. *See Wolf*, 114 Cal. App. 4th at 1359; *City of Hope*, 43 Cal. 4th at 394-95. The Court did not err when it entrusted the jury to weigh the credibility of the parties' experts, resolve the factual disputes, and interpret the contract accordingly. *City of Hope*, 43 Cal. 4th at 394-95.

B. Interpretation of the Third-Party Agreements

As an alternate basis for a new trial, Plaintiffs argue that the Court erred by not ruling as a matter of law that the agreements between UMG and third-party providers of digital content were "licenses." However, Plaintiffs waived any claim that the Court should have ruled as a matter of law that the third-party agreements were licenses because they never sought such a ruling prior to the submission of the issue to the jury. *See discussion* pp. 6-8, *supra*.

Plaintiffs further contend that as a minimum, the Court should have instructed the jury on as to the proper legal standard for determining whether the third-party agreements were licenses. Plaintiffs submitted an instruction, based on *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055 (C.D. Cal. 2008), that outlined factors indicative of whether a transaction is a sale or a license under copyright law.

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issues when they argue that they were severely prejudiced by the exclusion of the March 24, 2004 letter because, *inter alia*, Mr. Berman could not use it to support his custom and practice position.

See Docket No. 378. The Court refused to give that instruction.

Plaintiffs have failed to show why this supposed error entitles them to a new trial. Plaintiffs argue that "no other instruction gave the jury any basis to determine whether Defendant's [third-party] agreements were 'licenses' or 'sales.'" The issue for the jury, however, was not what a license is as a matter of copyright law, but rather what the parties intended when they agreed to the "records sold" and "masters licensed" provisions in the Eminem Agreements. Accordingly, the Court did not err when it declined to instruct the jury on what a "license" is in copyright law.

C. Clear Weight of the Evidence

Next, Plaintiffs maintain that a new trial is required because the jury's verdict was against the clear weight of the evidence. The judge may not grant a new trial simply because he would have arrived at a different verdict; rather, he must have a firm conviction that the jury has made a mistake. *Wallace v. City of San Diego*, 479 F.3d 616, 630-31 (9th Cir. 2007); *Landes*, 833 F.2d at 1372. Having sat through the trial and after reviewing the record, the Court finds that the jury's verdict was not against the clear weight of the evidence.

D. Evidentiary Rulings

Finally, Plaintiffs contend that several of the Court's evidentiary rulings were erroneous and substantially prejudiced Plaintiffs.

(1) Exclusion of the March 24, 2004 Letter

First, Plaintiffs argue that the Court should have admitted a March 24, 2004 letter bearing the signature of 27 self-described "music industry attorneys" to the heads of five major record companies. The letter argued that record companies should account for permanent downloads as "licenses" rather than "records sold." One of the 27 signatories was Mr. Paterno, who represented Aftermath in negotiations over the 1998 Eminem Agreement. According to Plaintiffs, the letter "constitutes a direct admission by the adverse party—through its attorney—concerning the parties' intent."

Plaintiffs' argument is flawed. The letter postdates the 1998 and 2003 Eminem Agreements by several years, and there is no evidence that Mr. Paterno signed the letter on behalf of Aftermath.[4] Therefore, the letter is not admissible under *Heston v. Farmers Ins. Group*, 160 Cal. App. 3d 402, 413-415, 206 Cal. Rptr. 585 (1984); it is not relevant to show Defendants' intent at the time they entered into the contracts.

Plaintiffs also contend that it was error to preclude them from using the letter for impeachment. However, Plaintiffs fail to explain how Mr. Paterno's signature on the letter was inconsistent with his testimony at trial.

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[4] Mr. Paterno was not even involved in the negotiation of the 2003 Agreement.

Furthermore, because the letter was irrelevant to task of contractual interpretation, to allow Plaintiffs to question Mr. Paterno about it would have confused the jury. The Court properly excluded the letter under Fed. R. Evid. 402 and 403.

(2) Exclusion of Prelitigation Statements by Universal and Apple Employees

Second, Plaintiffs contend that the Court erred when it excluded: (1) a 2007 essay by Steve Jobs, CEO of Apple, entitled "Thoughts on Music"; (2) a written statement to the Copyright Board from Eddy Cue, Vice President of iTunes; (3) 2006 testimony of Lawrence Kenswil, Executive Vice President of Business Strategy for Universal Music Group and former head of Universal eLabs, before the Copyright Royalty Board; and (4) a 2005 magazine interview with Jimmy Iovine, Chairman of Interscope Records. The Court excluded this evidence on the ground that its probative value, if any, was outweighed by the danger of unfair prejudice to Defendants. Plaintiffs argued that these statements demonstrated Defendants' understanding of the nature of their agreements with third-party digital download providers and demonstrated Apple's understanding of its agreements with Defendants. However, these stray uses of the word "license" were made by individuals who were not parties to and did not negotiate the Eminem Agreements. Furthermore, none of the statements explicitly or implicitly referenced the contracts at issue in this case. The Court properly excluded this evidence because it was not relevant to what Defendants meant when they used the phrase "masters licensed" in the contracts. Introduction of these random uses of the word

"license" by individuals unconnected to the Eminem Agreements would have wasted time and would likely have confused and mislead the jury.

Finally, even assuming this evidentiary ruling was error, Plaintiffs have not demonstrated that it was so prejudicial that it more likely than not tainted the verdict, thus warranting a new trial. *See Gribben v. United Parcel Serv., Inc.*, 528 F.3d 1166, 1172 (9th Cir. 2008).

(3) Exclusion of Testimony of Peter Menell

Plaintiffs' next contention is that the Court erroneously excluded testimony from Plaintiffs' proffered expert, Professor Peter Menell. Although Plaintiffs attempted to characterize Mr. Menell as a "custom and usage" expert, the bulk of his expert report was devoted to establishing legal opinions as to the meaning of the provisions of the Eminem Agreements at issue—not to providing evidence of common practice in the recording industry. For instance, in his report, Mr. Menell described his assignment and summarized his conclusions as follows:

> FBT, through its counsel, has asked me to provide my opinion as to whether the allocation of revenue that Aftermath Entertainment ("Aftermath") has received and continues to receive from third parties (such as Apple, Sprint PCS, T-Mobile, Nextel, and Cingular Wireless) for permanent digital downloads (including master tones) of sound records governed by the 1998 and 2003

> Aftermath-FBT agreements are governed by the standard royalty provision . . . , the masters license provision . . . , or some other clause. As set forth below, I conclude based on the contracts at issue, the contractual provisions and economic realities of the UMG-third party relationships, and a functional analysis of the recording industry that the permanent digital download (including master tones) revenues at issue in this case should be governed by the masters license provision.

It is well-settled that an expert witness may not offer, as her opinion, a legal conclusion. *E.g.*, *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008). Thus, an expert may testify to industry custom and usage with respect to particular contract terms, but he or she may not give an opinion on the ultimate contract interpretation issue. *Morrow v. Los Angeles Unified Sch. Dist.*, 149 Cal. App. 4th 1424, 1444-45, 57 Cal. Rptr. 3d 885 (2007). Here, Mr. Menell reached legal conclusions based on his construction of the Eminem Agreements, as opposed to providing his opinion as to how "masters licensed" provisions are typically used in the recording industry. The Court properly excluded Mr. Menell's legal opinion testimony. To the extent that Plaintiffs proffered Mr. Menell to testify to "the evolution of economic functions in the recording industry," his opinions lacked a proper foundation.

(4) Argument that Plaintiffs Were "Lucky"

Finally, Plaintiffs argue that the Court erred in denying their motion to preclude Defendants from referring to Plaintiffs as "lucky" or characterizing Plaintiffs' royalties as a windfall. However, Plaintiffs have pointed to no occasion where Defendants improperly referred to Plaintiffs' luck in meeting Eminem or argued that Plaintiffs' contractual entitlements should not be honored. And while Plaintiffs complain that Defendants stated at trial that Plaintiffs "got rich" and "made millions" off the Eminem Agreements, Plaintiffs' counsel also questioned Defendants' witnesses as to how many millions of dollars Defendants had "made on Eminem." Plaintiffs have not shown that they were substantially prejudiced by these comments.

IV. Conclusion

For the foregoing reasons, the motion for a new trial is DENIED.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 07-3314 PSG (MANx)

F.B.T. PRODUCTIONS, LLC, ET AL.,

Plaintiffs,

v.

AFTERMATH RECORDS, ET AL.,

Defendants.

Filed January 20, 2009

Before: The Honorable Philip S. GUTIERREZ, United States District Judge; Wendy K. Hernandez, Deputy Clerk

CIVIL MINUTES - GENERAL

PROCEEDINGS: (In Chambers) Order Denying Plaintiffs' Motion for Summary Judgment and Defendants' Motion for partial Summary Judgment

Before the Court are Plaintiffs' Motion for Summary Judgment and Defendants' Motion for Partial Summary Judgment. The Court finds the matters appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local R. 7-15. After

considering the moving and opposing papers, the Court hereby DENIES the motions.

I. Background

Plaintiffs F.B.T. Productions, LLC ("FBT") and Em2M, LLC ("Em2M") are entities that receive royalties payable for the use and exploitation of master recordings by Marshall B. Mathers III, better known as the rapper Eminem. Defendants are Aftermath Records ("Aftermath"), a joint venture, and its owners, Interscope Records ("Interscope"), UMG Recordings, Inc. ("UMG"), and Ary, Inc. ("Ary"). The primary question presented by this case is what royalty is due Plaintiffs when a consumer downloads an Eminem song to her computer or purchases an Eminem ringtone for her mobile phone.

A. The Eminem Agreements

In approximately 1995, Jeff and Mark Bass signed Eminem to an exclusive record deal with FBT, their production company. On March 9, 1998, FBT entered into an agreement ("the 1998 Agreement") to furnish Eminem's recordings to Aftermath. The 1998 Recording Agreement contains two royalty provisions. First, paragraph 4(a) sets a royalty for "full-price records sold in the United States" that varies between 12 and 20% (the "Records Sold" provision).[1] *Hoffman Decl.* Ex. A ¶ 4(a)(i). "Records"

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[1] According to Defendants, the artist's basic royalty rate varies with the artist's popularity. *Hoffman Decl.* ¶ 4. The 1998 (Continued...)

are defined as "all forms of reproductions, whether embodying sound alone or sound together with visual images, manufactured or distributed primarily for home use." *Id.* at ¶ 16(e).

Second, paragraph 4(c)(v) of the 1998 Agreement states that "[o]n masters licensed by us . . . to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from other uses of the masters" ("the Masters Licensed" provision). *Id.* at ¶ 4(c)(v). A "master" is defined as "a recording of a sound, without or with visual images, which is used or useful in the recording, production or manufacture of records." *Id.* at ¶ 16(d).

In 2000, the parties to the 1998 Agreement entered into a novation that established a direct contractual relationship between Eminem and Aftermath ("the 2000 Novation"). *Plfs' UF* ¶ 28. The 2000 Novation transferred the obligation to provide Aftermath with Eminem's recording services from FBT directly to Eminem. FBT became a "passive income participant," retaining a right to royalty income from Eminem's recordings. *Plfs' UF* ¶ 29; *Dfts' UF* ¶ 2. Aftermath agreed to render separate accountings to FBT and Eminem, and the 2000 Novation specified the royalty share of each. *Plfs' UF* ¶ 30.

Agreement provides for "escalations," meaning that the royalty rate increases as certain sales targets are met. *Id.*; *see also Hoffman Decl.* Ex. A 4(a)(i).

In 2003, Aftermath and Eminem entered into a new recording contract, which terminated the 1998 Agreement ("the 2003 Agreement"). *Plfs' UF* ¶ 37. Plaintiffs retained the right to royalties from Eminem's recordings under the 2003 Agreement. *Plfs' UF* ¶ 41. The structure of the 2003 Agreement was similar to the 1998 Agreement, but included an increased advance and higher royalties reflecting Eminem's rise to stardom. *Plfs' UF* ¶¶ 38-39. Like the 1998 Agreement, the 2003 Agreement set forth two royalty rates, one for "records sold," *Hoffman Decl.* Ex. D ¶ 5(a)(i), and one for "masters licensed . . . to others for their manufacture and sale of records or for any other uses," *Id.* at ¶ 5(c)(v).

In November 2004, the parties entered into the "2004 Amendment," which altered the 2003 Agreement to increase the advance for an upcoming LP, the fraction of FBT's passive income participation, and certain royalty rates. *Plfs' UF* ¶¶ 56, 58.

B. UMG's Agreements with Third Party Digital Media Providers

Since approximately 2001, UMG has entered into agreements with various third parties granting those entities rights to distribute music to consumers over the internet in various forms, including permanent downloads. *Plfs' UF* ¶ 86. Permanent downloads are digital copies of recordings that, once downloaded, remain permanently on an end-user's computer,

iPod, or other hardware device. *Plfs' UF* ¶ 73.[2] Apple's iTunes music store, which launched in 2003, quickly became the largest source of legal permanent downloads. *Plfs' UF* ¶¶ 69-70.

In approximately 2003, UMG began entering into contracts with major cellular telephone network carriers, including Sprint, Nextel, Cingular, and T-Mobile, to provide UMG recordings for use on mobile phones as mastertones. *Plfs' UF* ¶¶ 120-21. "Mastertones" is a term that refers to more than one type of digital media; most commonly, mastertones are short clips of a song that play on a cellular phone to signal an incoming call. *Plfs' UF* ¶ 82. Typically, the user permanently downloads the mastertone onto her mobile device. *Plfs' UF* ¶ 83. Another form ofmastertones play for a third party who calls the purchaser; they are stored on a central server and "streamed" to the caller. *Plfs' UF* ¶ 84.

In 2005, FBT and Eminem hired an accounting firm to audit Defendants' accounting records for the period beginning January 1, 2002 and ending June 30, 2005. *Plfs' UF* ¶ 191. The audit revealed that UMG was paying Plaintiffs royalties for permanent

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[2] In contrast, the "streaming" of music allows a user to listen to a song online, but no copy is created on her local machine. *Plfs' UF* ¶¶ 76, 78. A consumer can only listen to a streamed song contemporaneously with its transmission; it is not possible to listen to the song again without reconnecting to the provider. *Plfs' UF* ¶ 79. "Conditional downloads" are a form of download restricted such that a user must maintain a subscription to a given service in order to continue to listen to the downloaded songs. *Plfs' UF* ¶ 80.

downloads and mastertones based on the rate set forth in the "Records Sold" provision of the Eminem Agreements. *Plfs' UF* ¶ 192. Based on Plaintiffs' belief that royalties on permanent downloads and mastertones should be paid at the higher rate set forth in the "Masters Licensed" provision, the auditor calculated that Defendants had underpaid Plaintiffs by at least $650,000. *Plfs' UF* ¶ 192-93. Defendants responded to the audit report in a letter dated May 8, 2007, contesting the determination that certain royalties had been underpaid. *Plfs' UF* ¶ 196; *Dfts' SGI* ¶ 196.

On May 21, 2007, Plaintiffs filed a complaint for breach of contract and declaratory judgment based on Defendants' alleged underpayment of royalties for digital uses of Eminem's recordings. On March 6, 2008, Plaintiffs filed a second lawsuit for breach of contract and declaratory judgment, also claiming that Defendants had failed to properly account and pay royalties due to Plaintiffs. *See F.B.T. Productions, LLC, et al. v. Aftermath Records, et al.*, No. CV 08-1563 PSG (CWx) (Docket No. 1). The Court consolidated the two actions on May 19, 2008 and ordered Plaintiffs to file an amended complaint. Plaintiffs did so and later filed a second amended complaint ("SAC"), which asserted two counts for breach of contract and a third count for declaratory relief.

Plaintiffs now move for summary judgment on all claims. Defendants move for partial summary judgment on the first and third causes of action.

II. Legal Standard

Federal Rule of Civil Procedure 56(c) establishes that summary judgment is proper only when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). If the moving party satisfies the burden, the party opposing the motion must set forth specific facts showing that there remains a genuine issue for trial. See id. at 257.

A non-moving party who bears the burden of proving at trial an element essential to its case must sufficiently establish a genuine dispute of fact with respect to that element or face summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Such an issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. *See Anderson*, 477 U.S. at 250-51. If the moving party seeks summary judgment on a claim or defense for which it bears the burden of proof at trial, the moving party must use affirmative, admissible evidence. Admissible declarations or affidavits must be based on personal knowledge, must set forth facts that would be admissible evidence at trial, and must show that the declarant or affiant is competent to testify as to the facts at issue. *See* Fed. R. Civ. P. 56(e).

III. Discussion

A. Royalties Due on Permanent Downloads and Mastertones (Counts 1 and 3)

Plaintiffs' first cause of action seeks damages resulting from Defendants' alleged breach of contract with respect to the payment of royalties due on permanent downloads and mastertones of Eminem's recordings. *SAC* ¶ 38. Plaintiffs' third cause of action seeks a declaration that Defendants are obligated to pay royalties equal to fifty percent (50%) of Defendants' net receipts "from the licensing by Defendants or Defendants' Licensees of the Eminem Masters to Music Download Providers and Mastertone Providers." *SAC* ¶¶ 54-56. Because both counts necessitate a determination of the royalty due on these digital uses, the Court will treat the first and third causes of action together for the purpose of summary judgment.

Two provisions in the Eminem Agreements are central to the instant dispute. First, the "Records Sold" provision in the 1998 and 2003 Agreements sets a royalty for "full-price records sold in the United States" that varies between 12 and 20%. *Hoffman Decl.* Exs. A ¶ 4(a) and D ¶ 5(a). Second, the "Masters Licensed" provision provides that "[o]n masters licensed by us . . . to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from other uses of the masters." *Hoffman Decl.* Exs. A ¶ 4(a)(v) and D ¶ 5(c)(v). To date, Aftermath has paid Plaintiffs royalties for permanent downloads and mastertones of Eminem

recordings under the Records Sold provision. Plaintiffs contend that they are entitled to summary judgment because the Eminem Agreements unambiguously require Defendants to account for royalties on permanent downloads and mastertones under the "Masters Licensed" provision. Defendants argue that Plaintiffs' proffered construction is not a reasonable reading of the contract language and that summary judgment should be granted for Defendants on this basis.

Under California law, when the meaning of the words in a contract is disputed, the Court must provisionally consider all extrinsic evidence that is relevant to show whether the contractual language is reasonably susceptible to either of the competing interpretations advanced by the parties. *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33, 39, 69 Cal Rptr. 561 (1968); *Wolf v. Sup. Ct.*, 114 Cal. App. 4th 1343, 1351, 8 Cal. Rptr. 3d 649 (2004). This is the case even if the contract appears unambiguous on its face, because "the fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms." *Pac. Gas*, 69 Cal. 2d at 39. "Extrinsic evidence can include the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." *Cedars-Sinai Med. Ctr. v. Shewry*, 137 Cal. App. 4th 964, 980-81 (2006). Whether a contract is ambiguous is a matter of law. *Maffei v. Northern Ins. Co.*, 12 F.3d 892, 898 (9th Cir. 1993). If the Court determines that the contractual provision in question

is ambiguous, summary judgment is inappropriate because the differing views of the parties' intent will raise genuine issues of material fact. *Id.* Summary judgment is appropriate only if the contract is unambiguous. *Nat'l Union Fire Ins. Co. v. Argonaut Ins. Co.*, 701 F.2d 95, 97 (9th Cir. 1983).

The Eminem Agreements do not expressly state whether royalties on permanent downloads and mastertones are to be calculated under the Records Sold provision or the Masters Licensed Provision. Furthermore, neither Plaintiffs nor Defendants have submitted evidence of the negotiating parties' discussions, drafts, or other contemporaneous expressions of intent as to how permanent downloads and mastertones were to be treated under the Agreements.[3] Accordingly, the Court must look to the nature of the contract and the surrounding circumstances to interpret the contractual language. *Wolf*, 114 Cal. App. 4th at 1357; *Gen. Motors Corp. v. Sup Ct.*, 12 Cal. App. 4th 435, 442, 15 Cal. Rptr. 2d 622 (1993).

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[3] Plaintiffs and Defendants have submitted deposition testimony of various individuals who offer their understanding of which provision of the Eminem Agreements applies to permanent downloads and mastertones. However, the parties have not shown that (1) each of those individuals was involved in negotiating or drafting the Agreements and (2) that the individual's understanding was expressed during negotiations. Indeed, it is undisputed that the parties did not discuss the treatment of digital uses during the negotiation of the 2003 Agreement. *Plfs' UF* ¶ 50. The parties' undisclosed intent or understanding is irrelevant to contract interpretation. *Cedars-Sinai*, 137 Cal. App. 4th at 980 (citation omitted).

Plaintiffs argue that the plain language of the Masters Licensed provision, which states: "[o]n masters licensed by us . . . to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from other uses of the masters," applies to *all* "licenses" of Eminem recordings to third parties. Plaintiffs maintain that the relationship between UMG and third-party permanent download and mastertone providers are "licenses" within the legal meaning of that term. Therefore, according to Plaintiffs, the Eminem contracts entitle them to a 50% royalty on these digital uses.

Plaintiffs have submitted evidence which would support a finding that at least some of the agreements between Defendants and third-party permanent download providers are licenses. "The distributor of a copyrighted product's intent to regain possession is strong evidence that the produce was licensed, not sold, to the recipient." *UMG Recordings, Inc. v. Augusto,* 558 F. Supp. 2d 1055, 1060 (C.D. Cal. 2008). For example, Plaintiffs have submitted an agreement between UMG and Apple Computer, Inc. *Busch Decl.* Ex. 20. The agreement indicates that UMG may withdraw any of its sound recordings from the iTunes online music store, *id.* at ¶ 1(b), which is indicative of a license, not a sale. The iTunes agreement provides recurring benefits for UMG, the copyright holder, which also suggests that the agreement constitutes a license. *See id.* at 1061 ("Generally, licenses provide recurring benefits for the copyright owner."). For each song or album sold,

Apple agrees to pay a certain amount to UMG. *Busch Decl.* Ex. 20 ¶ 2(a). Thus, under the 2002 iTunes agreement, Apple appears to lack many of the critical rights of ownership, such as the right to perpetual possession and freedom from obligations to UMG. This suggests that the agreement was a license. *See UMG Recordings*, 558 F. Supp. 2d at 1062.

Plaintiffs state that Defendants have produced approximately 80 such agreements, which are "similar in terms of the rights granted to the third parties and their general structure." *Plfs' Opp.* 8:25-26. Defendants contest this assertion, however, arguing that they have produced over 500 third-party agreements that vary and cannot be generalized as to their grant of rights. *Dfts' SGI* ¶¶ 86-87.[4] Therefore, the Court cannot conclude that all of the permanent download agreements are licenses.

Furthermore, Defendants dispute that the parties intended the term "license" in the Eminem Agreements to have a copyright law definition. Under California law, "[t]he words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning;

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[4] Plaintiffs also argue that by 2003, UMG had entered into agreements with Apple and other digital providers, so it knew that the Masters Licensed provision would apply to permanent downloads. However, Defendants correctly point out that there is no evidence that the negotiators of the Eminem contracts had read or were aware of the relevant third party digital provider contracts.

unless used by the parties in a technical sense, or unless a special meaning is given to them by the usage, in which case the latter must be followed." Cal. Civ. Code § 1644. According to Defendants, the parties intended for the Masters Licensed provision to apply only to "ancillary uses" of the master recordings. Defendants define "ancillary uses" as transactions ancillary to the record company's main business of selling records, such as licensing an Eminem song for use in a movie or for inclusion in a compilation album. *Dfts' Opp.* 4:10-15. However, there is no limiting provision in the Masters Licensed Provision or elsewhere in the Eminem Agreements that indicates that the Masters Licensed provision only applies to "ancillary" uses or income. Defendants point to a sentence in the 2000 Novation which states:

> [I]t is agreed that the foregoing fractions of the applicable royalty rate shall also be applied to any advances or fees payable to Artist in connection with any ancillary uses of each master recording recorded by Artist pursuant to the Agreement after the Delivery of LP 2 and prior to the Delivery of LP 7 . . . .

Hoffman Decl. Ex. C ¶ 7(e). Based on the record before it, it is not clear to the Court that this sentence is modifying, limiting, or referring to the Masters Licensed Provision. Defendants insist that the reference to royalties on "ancillary uses" must refer to the Masters Licensed provision; however, this reference is not clear from the plain language of the contract, and Defendants have not convinced the Court that this section of the Novation must refer to the Masters Licensed Provision.

Next, both parties argue that industry custom supports their interpretation of the Eminem Agreements. Plaintiffs assert that the "purpose" of a "masters licensed" provision is "to provide for a higher royalty rate when the record company licences the master recordings to third parties because in such situations the record company does not incur the expensive incremental cost associated with manufacturing, packaging and distributing the physical records associated with a release by a third party." *Plfs' UF* ¶ 23. Plaintiffs also maintain that this type of language in a recording contract usually serves as a "catch all" provision intended to apply to all licensed uses of the master recordings not specifically provided for in the contract. *Plfs' UF* ¶ 24. Defendants fervently dispute this assertion, contending that provisions such as the Masters Licensed section typically apply only to compilation records and incorporation into movies, TV shows, and commercials. *Dfts' SGI* ¶¶ 23-24. The Court finds that neither party has conclusively established that "custom and practice" mandates a particular interpretation of the Masters Licensed provision. Instead, the parties' conflicting evidence creates a triable issue of fact.[5]

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[5] The Court notes that much of Plaintiffs' expert testimony appears to be inadmissible, as it sets forth an opinion on the proper interpretation of the Eminem Agreements. *See generally Menell Decl.* An expert may testify to industry custom and usage with respect to particular contract terms, but may not offer an opinion on the ultimate contract interpretation issue. *Morrow v. Los Angeles Unified Sch. Dist.*, 149 Cal. App. 4th 1424, 1444-45, 57 Cal. Rptr. 3d 885 (2007).

Defendants also contend that Plaintiffs' proffered understanding of the Eminem Agreements ignores a key provision of the 2004 Amendment. This provision states: "Sales of Albums by way of permanent download shall be treated as USNRC Net Sales for the purpose of escalations, provided that the sales price concerned falls within a top line sales price category applicable to such method of sale." *Hoffman Decl.* Ex. E. ¶ 2(a). Plaintiffs argue that the 2004 Amendment's treatment of downloads is only relevant for the purpose of calculating units toward escalation targets. However, Defendants point out that referring to downloads as "sales of albums" would be nonsensical if, as Plaintiffs contend, downloads are never "sold" but merely licensed. Plaintiffs' response is that the Masters Licensed provision explicitly references "the manufacture and sale of records" by third parties. Therefore, the 2004 Amendment's provision does not conclusively resolve the ambiguity.[6]

Defendants maintain that the "Records Sold" provision unambiguously applies to permanent downloads and mastertones because these are forms of "records." It is undisputed that the 1998 and 2003 Agreements define a "record" as "all forms of reproductions, whether embodying sound alone or sound together with visual images, manufactured and distributed primarily for home use." *Dfts' UF* ¶ 4. Furthermore, the Agreements give Aftermath the right to sell "records" "in any [or] all forms of

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[6] Additionally, the Court notes that this provision does not address mastertones.

media now known and hereinafter developed." *Hoffman Decl.* Ex. A 8 at ¶ 40. Thus, Defendants maintain that their interpretation is more consistent with the contracts' expansive grant of rights to Defendants to distribute "records" embodying the Eminem master recordings.

Finally, Defendants also point to the fact that Plaintiffs never objected to Defendants' payment of royalties under the Records Sold provision until the auditor raised the issue in 2006. Construction given to a contract by acts and conduct of parties with knowledge of the contract terms and before a controversy arises is relevant to contract interpretation. *S. Pac. Trans. Co. v. Sante Fe Pac. Pipelines, Inc.*, 74 Cal. App. 4th 1232, 1242, 88 Cal. Rptr. 2d 777 (1999). Therefore, this evidence of Plaintiffs' conduct is also relevant to show their intent.

"The purpose of the law of contracts is to protect the reasonable expectations of the parties." *ASP Props. Group v. Fard, Inc.*, 133 Cal. App. 4th 1257, 1268, 35 Cal. Rptr. 3d 343 (2005) (citation omitted). Here, there is no direct evidence of objective manifestations of the parties' intent at the time the Eminem Agreements were negotiated, and the Agreements do not explicitly indicate under which royalty provision permanent downloads and mastertones are to be treated. Indeed, it is undisputed that parties did *not* discuss the treatment of downloads and mastertones while negotiating the most recent version of the contract. *Plfs' UF* ¶ 50. Based on the conflicting extrinsic evidence before the Court, the contracts are reasonably susceptible to more than one

interpretation. Therefore, Plaintiffs' and Defendants' reasonable expectations regarding royalties due on permanent downloads and mastertones when they entered into the Eminem Agreements remain triable issues of material fact. *See Wolf,* 114 Cal. App. 4th at 1359-60. Accordingly, the motions for summary judgment must be DENIED.

B. Underpayment due to Misallocation of Costs (Count 2)

Plaintiffs' remaining cause of action alleges that Defendants have underpaid royalties due Plaintiffs in the amount of $159,332. *SAC* ¶¶ 45-47. Plaintiffs claim that they are entitled to summary judgment on this claim because Defendants admitted this underpayment in writing on May 8, 2007. *SAC* ¶ 47.

Defendants correctly point out that Plaintiffs have not fully explained the basis for this claim. Plaintiffs' Statement of Uncontroverted Facts in support of their motion for summary judgment claims that in a letter dated May 8, 2007, Defendants "admitted an underpayment to F.B.T. of $159,332 stemming from incorrect allocation of costs as between Eminem and Plaintiffs." *Plfs' UF* ¶¶ 196, 2. However, in that letter, Defendants disputed the auditor's determination that Defendants had misallocated producer royalties, expressly maintaining that no adjustment was necessary under this provision of the Eminem Agreements. *Dfts' SGI* ¶ 2; *See Busch Decl.* Ex. 33 ¶ 16. According to Defendants, the $159,332 figure represents an "interim net figure calculated as part of Aftermath's audit response, which netted Plaintiffs' claim against some, but not all, of Defendants' counterclaims

seeking recovery of certain overpayments." *Dfts' SGI* ¶ 2; *see also Busch Decl.* Ex. 33, p.5-6.; Ex. 41 (Hu Dep.) 29:16-30:20.

Furthermore, as Defendants correctly argue, it is unclear whether $159,332 is the entirety of Plaintiffs' second cause of action. The SAC introduces the second claim for breach of contract with the statement, "*For example and without limitation,* Defendants have violated the terms of the Agreements as set forth in the following paragraphs." *SAC* ¶ 45 (emphasis added). The following paragraphs describe Defendants' alleged misallocation of producer royalties as between Plaintiffs and Eminem. *Id.* ¶¶ 46-49. However, because Plaintiffs did not limit their second cause of action to this specific breach, Plaintiffs may be improperly moving for summary judgment as to part of a claim without notice to Defendants.

In summary, Plaintiffs have failed to show that there is no genuine issue of material fact for trial on their second cause of action. Therefore, the motion for summary judgment as to the second claim is DENIED.

IV. Conclusion

For the foregoing reasons, Plaintiffs' motion for summary judgment and Defendants' motion for partial summary judgment are DENIED.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 09-55817, 09-56069

F.B.T. PRODUCTIONS, LLC; EM2M, LLC,

Plaintiffs-Appellants,

v.

AFTERMATH RECORDS, DBA AFTERMATH ENTERTAINMENT; ET AL.,

Defendants-Appellees.

Filed August 2, 2010

Before: FARRIS, HALL and SILVERMAN, Circuit Judges

ORDER

Appellees' motion to defer submission is DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 09-55817, 09-56069

F.B.T. PRODUCTIONS, LLC; EM2M, LLC,

Plaintiffs-Appellants,

v.

AFTERMATH RECORDS, DBA AFTERMATH ENTERTAINMENT; ET AL.,

Defendants-Appellees.

Filed October 21, 2010

Before: FARRIS, HALL and SILVERMAN, Circuit Judges

ORDER

The panel has voted to deny appellees' petition for rehearing. Judge Silverman has voted to reject the petition for rehearing en banc and Judges Farris and Hall so recommend.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

U.S. Const., Amend. VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 50.

Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) Judgment as a Matter of Law.

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must

specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment--or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged--the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

* * *

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July 6, 2010

Clerk of the Court
U.S. Court of Appeals for the Ninth Circuit
P.O. Box 193939
95 Seventh Street
San Francisco, CA 94103-1526

Re: F.B.T. Productions, LLC v. Aftermath Records (CA No. 09-55817 (argument scheduled in Pasadena on July 12, 2010) (before Judges Farris, Hall and Silverman)

Dear Sir or Madam:

I am writing to provide citations to additional authority not cited in the briefs to which I will make reference during the argument scheduled for Monday, July 12, 2010. These cases support the contention at Reply Brf. 23-27 that the failure to make a JMOL on the issue of contract interpretation does not waive the right to present that issue on appeal from the judgment (which is also reviewable as an appeal from the denial of summary judgment on that legal issue):

- *Estate of Blume v. Marian Health Ctr.*, 516 F.3d 705, 707 (8th Cir. 2008)
- *Wilson Arlington Co. v. Prudential Ins. Co. of Am.*, 912 F.2d 366, 370-72 (9th Cir. 1990)
- *Banuelos v. Constr. Laborers' Trust Funds*, 382 F.3d 897, 902-03 (9th Cir. 2004), *cert. denied*, 545 U.S. 1127 (2005)
- *Howell v. Polk*, 532 F.3d 1025, 1027 n.3 (9th Cir. 2008)
- *U.S. ex rel. A+ Homecare, Inc. v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 441 (6th Cir.), *cert. denied*, 546 U.S. 1063 (2005)
- *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-20 (7th Cir. 2003)
- *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185, 1190 (8th Cir. 1999)

Respectfully,

/s/ Jerome B. Falk, Jr.

JEROME B. FALK, JR.

JBF/pmm

Excerpts from Trial Exhibit 5 (March 9, 1998 Agreement), CA9 ER 837-846:

* * *

4.(a) Your royalty rate (which is inclusive of all third parties, such as producers, artists, vocalists, and other persons entitled to royalties in connection with the Masters), payable in respect of one hundred percent (100%) of U.S. Net Sales, computed at the applicable percentage, indicated below, of the Royalty Base Price, will be the following:

On full-price records sold in the United States:

(i)(A) LPs 1, 2 and 3: eighteen percent (18%) for the first five hundred thousand (500,000) net sales through normal retail channels in the United States ("USNRC Sales"), eighteen and one-half percent (18.5%) for USNRC Sales in excess of five hundred thousand (500,000) but not in excess of one million (1,000,000), and nineteen percent (19%) for USNRC Sales in excess of one million (1,000,000), computed prospectively on an LP-by-LP basis.

(B) LPs 4, 5, 6 and 7: nineteen percent (19%) for the first five hundred thousand (500,000) USNRC Sales, nineteen and one-half percent (19.5%) for USNRC Sales in excess of five hundred thousand (500,000) but not in excess of one million (1,000,000), and twenty percent (20%) for USNRC Sales in excess of one million (1,000,000), computed prospectively on an LP-by-LP basis.

(i) Twelve percent (12%) for records other than LPs.

(b)(i) On records sold in Canada, your royalty rate will be eighty-five percent (85%) of the United States rate (without regard to escalations).

(ii) On records sold in the Major Territories, (i.e. United Kingdom, Germany, France, Italy, Spain, Belgium, Luxembourg, The Netherlands, Denmark, Japan, Australia) the royalty rate will be seventy-five percent (75%) of the United States rate (without regard to escalations).

(iii) On records sold outside the United States and those countries referred to in subparagraphs (i) and (ii) above, the royalty rate will be sixty percent (60%) of the United States rate (without regard to escalations).

(c) Notwithstanding the foregoing:

(i)(A) On records sold through a direct mail or mail order distribution method (including, without limitation, through "record clubs") or through any combination of the foregoing, the royalty rate will be fifty percent (50%) of the net receipts from the sale of those records.

(B) On records sold through retail stores outside the United States in connection with bona-fide, specific special radio or television advertisements (sometimes referred to as "key outlet marketing") ("Key Outlet Campaign") whether alone or in combination with any

direct mail or mail order distribution method, the royalty rate will be one half (1/2) of the otherwise applicable royalty rate for sales occurring during the semi-annual accounting period immediately preceding the semiannual accounting period in which the Key Outlet Campaign commences, all semi-annual accounting periods in which the Key Outlet Campaign is running, and the semi-annual accounting period immediately following the semi-annual accounting period in which the Key Outlet Campaign ends. In no event, however, will your royalty in respect of those sales exceed an amount equal to fifty percent (50%) of our net receipts from the sale of those records.

(ii) On Mid-price records the royalty rate will be two-thirds (2/3) of the otherwise applicable royalty rate; and on Budget records the royalty rate will be one-half (1/2) of the otherwise applicable royalty rate.

(iii) On records sold to the United States Government, its subdivisions, departments or agencies (including records sold for resale through military facilities) or to educational institutions or libraries, the royalty rate will be one-half (1/2) of the otherwise applicable royalty rate.

(iv) On multiple albums, the royalty rate will be the lesser of (A) the otherwise applicable royalty rate and (B) the otherwise applicable royalty rate multiplied by a fraction, the numerator of which is the SRLP of the

multiple album and the denominator of which is the product of the SRLP of a top-line single-disc record and the number of discs contained in the multiple album.

(v) On masters licensed by us or our NRS Licensees to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from those other uses of the masters.

(e) Notwithstanding the foregoing:

(i) No royalties or mechanical royalties will be payable on records furnished as free or bonus records to members, applicants, or other participants in any record club or other direct mail distribution method; on records distributed for promotional purposes to radio stations, television stations or networks, record reviewers, or other customary recipients of promotional records; on so-called "promotional sampler" records; on records sold as scrap or as "cut-outs"; or on records sold at less than fifty percent (50%) of their regular wholesale price to distributors, subdistributors, dealers, or others, whether or not the recipients thereof are affiliated with us. Furthermore, no royalties or mechanical royalties will be payable on records (whether or not intended for sale by the recipient) furnished on a no-charge or free basis (such as, but not limited to, records commonly described in the record industry as "free

goods" or "freebies" whether so-called "standard free goods" [standard free goods are currently fifteen percent (15%) of LPs]) or pursuant to a special sales program of limited duration (sometimes referred to below as a "Special Program" [with respect to LPs, not to exceed an additional ten percent (10%)].

(ii) Royalties on records sold at a discount (including standard free goods and Special Program free goods) to distributors, subdistributors, dealers, or others, whether or not affiliated with us [except for records sold at less than fifty percent (50%) of their regular wholesale price, for which no royalties are payable hereunder] will be reduced in the same proportion as the regular wholesale price of those records is reduced on those sales. The number of records equal to the percentage discount multiplied by the number of records sold at such discount will be deemed to be free goods.

(iii) For purposes of computing royalties, there will be deducted from the SRLP (or other applicable price, if any, upon which royalties are calculated) of records hereunder an amount equal to twelve and one-half percent (12 1/2%) for all records in the form of single-fold vinyl discs; an amount equal to fifteen percent (15%) for all records in the form of double-fold vinyl discs; an amount equal to twenty percent (20%) for all records in the form of analog non-vinyl discs (except for vinyl-disc singles packaged in colorless sleeves and without any special elements, for which

there will be no deduction from the SRLP under this subparagraph); twenty percent (20%) thereof for all other records in the form of analog cassette tapes; and twenty-five percent (25%) thereof for records in the form of digital records (including, without limitation, Compact Discs), and for all records in any other form now known or hereafter devised.

(iv) The royalty payable to you hereunder on a record or other device embodying masters together with other master recordings will be computed by multiplying the otherwise applicable royalty rate by a fraction, the numerator of which will be the number of selections contained on the masters embodied in that record or other device and the denominator of which shall be the total number of selections recorded in all royalty-bearing recordings (including the masters) embodied in that record or other device.

(f) The royalty payable to you for Compact Discs shall be ninety percent (90%) of the otherwise applicable royalty rate.

* * *

16.(e) "record" means all forms of reproductions, whether embodying sound alone or sound together with visual images, manufactured or distributed primarily for home use.

* * *

(h) "new medium" records means: records (other than audiovisual records) in any software medium (including, without limitation, digital audio tape," "digital compact disc," "and mini-disc" and transmission directly into the home) in which recorded music is not in general commercial distribution in the United States as of January 1, 1997.

* * *

Excerpts from Trial Exhibit 9 (September 27, 2000 Novation), CA9 ER 879-883:

* * *

6. Commencing with the accounting period ending 12/31/00 Aftermath shall cause its distributor to render separate accountings to FBT and Artist. Interscope hereby acknowledges that as long as it is the distributor of records released under the Agreement it shall send separate accounting statements together with the respective payments directly to Artist and FBT. Aftermath agrees to cause any succeeding distributor of records released hereunder to agree in writing the foregoing insofar as they are concerned. Aftermath shall cause its distributor to provide FBT with a copy of all of the Artist accounting statements and Artist with a copy of all of the FBT accounting statements. Interscope hereby acknowledges it will send copies of all of the Artist's accounting statements with FBT's accounting statements for the same accounting period to FBT and it will send copies of all of FBT's accounting statements with Artist's accounting statements for the same accounting period to Artist. Aftermath agrees to cause any succeeding distributor of records released hereunder to agree in writing the foregoing. (Aftermath or its distributor's inadvertent failure to send copies of the Artist's and FBT's accounting statements to FBT and Artist respectively shall not be deemed a breach hereof provided such statements are provided to FBT &/or Artist as applicable within a reasonable time following receipt of notice of such failure). The accounting and audit provisions set forth in paragraph 14 of the Agreement shall be deemed

applicable to FBT for FBT's portion of royalties and to Artist for Artist's portion of royalties payable respectively in connection with sales under the Agreement. In connection with LPs 1 & 2 (and each master recording recorded by Artist pursuant to the Agreement prior to the Delivery of LP 2 whether embodied thereon or not) the royalties shall be payable 8/18 of the applicable royalty rate to FBT and 10/18 of the applicable royalty rate to Artist after deducting the applicable producers' share and all other third party royalty obligations "off the top". Attached hereto is "Schedule A" which sets forth how the royalties are payable for such LPs (and each master recording recorded by Artist pursuant to the Agreement prior to the Delivery of LP 2). Furthermore, it is agreed that the foregoing fractions of the applicable royalty rate shall also be applied to any advances or fees payable to Artist in connection with any ancillary uses of each master recording recorded by Artist pursuant to the Agreement prior to the delivery of LP2 (after the applicable "off the top" deductions as otherwise set forth herein). The parties acknowledge that all recoupable costs incurred during the Pre-assignment Term shall be recouped against FBT and Artist and paid in accordance with the terms of the Agreement (but as between FBT and Artist, such recoupment shall be at the proportionate rates set forth on Schedule A for the first unit of the LP concerned). Aftermath agrees to assume FBT's third party royalty obligations (and credit obligations provided Aftermath's failure shall not be deemed a breach hereof) arising for the accounting period ending December 31, 2000 and thereafter in accordance with the terms of the applicable third party agreements to the extent (i)

FBT has furnished same to Aftermath on or before January 19, 2001; (ii) provided that the financial terms are as set forth on the attached Schedule A; and (iii) provided that the other terms, such as frequency of accounting, are consistent with standard record industry practices.

* * *

7.(e) In connection with LPs 3-7 and each master recording recorded by Artist pursuant to the Agreement after the Delivery of LP2 and prior to the Delivery of LP 7 whether embodied on a Commitment LP or not (the following shall also be applicable to ancillary uses of all master recordings recorded after the Delivery of LP 2 and prior to the delivery of LP7) the royalties shall be payable, on the first unit sold, 8/20 to FBT and 12/20 to Artist of the royalty payable after deducting the applicable producers' share and all other third party royalty obligations (provided the terms of the third party royalty obligations shall be bona fide and customary considering all of the relevant facts and circumstances) "off the top", provided to the extent an applicable producer is hired at a royalty rate in excess of such producer's current "quote", such excess shall solely reduce Artist's share and further to the extent a producer's current quote is a royalty rate in excess of 6% pro-rated such excess shall solely reduce Artist's share. Furthermore, it is agreed that the foregoing fractions of the applicable royalty rate shall also be applied to any advances or fees payable to Artist in connection with any ancillary uses of each master recording recorded by Artist pursuant to the Agreement after the Delivery of LP 2 and prior to the Delivery of LP 7 (after the applicable "off the top"

deductions as otherwise set forth herein). If Artist is a producer of master recordings hereunder, then for the purposes of calculating Artist's share and FBT's share a royalty attributable to his production may be deducted "off the top" as if he were a third party producer but (i) such royalty shall be "capped" at 3% and pro-rated to the extent Artist is not the sole producer of the applicable master recording by multiplying Artist's producer royalty rate by a fraction the numerator being equal to one and the denominator being equal to the number of producers or co-producers rendering services in connection therewith; and (ii) Aftermath shall not be obligated to pay Artist a separate royalty stream for producing master recordings featuring Artist as the lead artist as if Artist was a third party producer. The royalty escalations based on sales set forth above shall be credited entirely to the Artist's royalty account.

* * *

Excerpt from Trial Exhibit 17 (November 1, 2004), CA9 ER 1011:

AFTERMATH RECORDS
c/o Interscope Records
2220 Colorado Avenue
Santa Monica, CA 90404

As of November 1, 2004

Marshall B. Mathers III
c/o Paul Rosenberg
270 Lafayette Street
Suite 805
New York, NY 10012

Dear Mr. Mathers:

The following, when signed by you and by us ("Aftermath"), will amend, modify and form a part of the agreement between you and Aftermath and dated as of July 2, 2003, as amended (the "Agreement"). Unless specifically provided to the contrary herein, all terms defined in the Agreement will have the same meaning herein.

1. Paragraph 4(b) is hereby modified by deleting [redacted] as the Advance for LP1 and inserting [redacted] in its place. Notwithstanding anything to the contrary contained in the Agreement, Aftermath will pay such sum to you promptly following the later of your delivery of LP 1 and the complete execution hereof. For the avoidance of doubt, no recording costs will be

deducted from such Advance and the Advance is not recoupable from the FBT share of record royalties.

2.(a) Subparagraph 5(a)(i) of the Agreement is hereby modified by increasing the royalty rate on full-price records sold in the United States to twenty-two percent (22%) for the first five million (5,000,000) net sales units through normal retail channels in the United States ("USNRC Net Sales"), and escalating to twenty-three percent (23%) for USNRC Net Sales units in excess of five million (5,000,000), computed prospectively on an LP-by-LP basis. Sales of Albums by way of permanent download shall be treated as USNRC Net Sales for the purposes of escalations, provided that the sales price concerned falls within a top-line sales price category applicable to such method of sale.

(b) Subparagraph 5(a)(ii) of the Agreement is hereby modified increasing the royalty rate for single records from twelve percent (12%) to (14%).

(c)(i) Subparagraph 12(c) is hereby modified to change the percentage and fraction of F.B.T.s' passive income participation. In all places that F.B.T. was entitled to receive "8/20ths" such amount shall be replaced with "8/22nds" provided in all places that F.B.T. was entitled to receive 35% such amount shall not change. In all places where it states Artist's share as "12/20ths" such amount shall be replaced with "14/22nds".

(ii) Notwithstanding the foregoing, for the purposes of Paragraph 12A, FBT's fractional interest shall be deemed to remain at 8/20ths of the applicable Basic

Rate (calculated after giving effect to a 90% compact disc royalty rate for F.B.T.).

* * *

Instruction No. 25 (A), CA9 ER 422:

NO CONFLICT IN EXTRINSIC EVIDENCE – COURT INTERPRETS CONTRACT

The recording agreements and amendments admitted in evidence as Exhibits _____ govern the rights and duties of the parties. It is my job as judge to interpret the meaning of these agreements, and therefore, I will tell you what the recording agreements mean. Under the recording agreements:

1. Plaintiff had a duty to _____ [*describe plaintiffs' duty*]; and

2. Defendant had a duty to _____ [*describe defendants' duty*].

Authority: (Matthew Bender) *Cal. Forms of Jury Inst.*, MB § 300B.01 at 3B3.

Modification: None

Note: This instruction should only be given if the Court finds that any of the disputed contractual provisions are not "reasonably susceptible" to the parties' competing interpretations and that there is no conflict in the extrinsic evidence that the jury must resolve. In that event, the instruction should be appropriately modified to reflect the Court's findings.

Supreme Court, U.S.
FILED
FEB 9 - 2011
OFFICE OF THE CLERK

No. 10-768

In The Supreme Court of the United States

AFTERMATH RECORDS (d/b/a AFTERMATH ENTERTAINMENT); INTERSCOPE RECORDS; UMG RECORDINGS, INC.,

Petitioners,

v.

F.B.T. PRODUCTIONS, LLC; EM2M, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT REGARDING QUESTIONS PRESENTED

Questions 1 and 2 as framed by Petitioners are not properly presented in this case. As explained at pp.10, 19-24, *infra*, the Court of Appeals held that it had the power to review a pure issue of law—contract interpretation where no relevant extrinsic evidence was presented—on appeal from a final judgment after verdict, based upon an analysis of the trial record. The Petition raises no issue concerning this holding, and it is consistent with precedent from numerous Circuits.

The opinion's citation of cases, now called into question by *Ortiz v. Jordan*, No. 09-737, that authorized appellate review of the pretrial denial of summary judgment on a question of law, was unnecessary to the foregoing holding. Accordingly, Questions 1 and 2 are not properly presented.

CORPORATE DISCLOSURE STATEMENT

Respondents F.B.T. Productions, LLC and Em2M, LLC are Michigan limited liability corporations, have no parent company, and no publicly held company owns 10% or more of either company's stock.

TABLE OF CONTENTS

	Page
STATEMENT REGARDING QUESTIONS PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vi
STATEMENT OF THE CASE	1
A. F.B.T. Discovers And Signs Eminem.	1
B. F.B.T. And Eminem Contract With Aftermath.	2
C. Digital Online Music Services Explode Into The Music Industry And Petitioners Enter Into Licensing Agreements With Third Party Digital Download Providers.	4
D. F.B.T. Discovers That Petitioners Have Been Underpaying Royalties And Initiates This Lawsuit.	6
E. District Court Proceedings.	6
1. Pre-Trial Proceedings.	6
2. Trial, Judgment And Post-Trial Rulings.	7
F. Appellate Proceedings.	8

TABLE OF CONTENTS

		Page
1.	F.B.T.'s Argument On Appeal.	8
2.	Petitioners' Motion To Defer Pending *Ortiz* Is Denied.	9
3.	The Ninth Circuit Unanimously Reverses The Judgment.	10
4.	Petitioners' Motion For Rehearing And Rehearing *En Banc* Is Denied.	12
REASONS FOR DENYING THE WRIT		13
I.	*ORTIZ* DOES NOT UNDERMINE THE NINTH CIRCUIT'S DECISION, WHICH RESTS ON A GROUND INDEPENDENT OF THE ISSUE RESOLVED IN *ORTIZ*.	14
A.	The Proper Interpretation Of The Recording Agreements Is A Pure Question Of Law.	14
B.	The Ninth Circuit's Ruling That Pure Questions of Law Need Not Be Raised In A JMOL Motion To Preserve The Issue For Appeal From A Final Judgment Is Not Affected By *Ortiz*.	19

TABLE OF CONTENTS

		Page
	C. *Ortiz* Is Relevant Only To An Alternative Ground For Reaching The Merits Of The Contract Interpretation Issue.	23
II.	SUMMARY REVERSAL IS UNWARRANTED AND INAPPROPRIATE.	25
	A. No Appellate Forfeiture Prevented The Ninth Circuit From Reaching The Merits.	25
	B. F.B.T. Did Not Waive Its Contract Interpretation Argument Through Its Asserted Acquiescence To Withdrawing Instruction 25A.	26
	C. The Ninth Circuit's Ruling On The Merits Was Correct.	27
CONCLUSION		29
APPENDIX:	1998 RECORDING AGREEMENT— RELEVANT EXCERPTS	1a

TABLE OF AUTHORITIES

Page(s)

Cases

Abers v. Rounsavell, 189 Cal. App. 4th 348 (2010) 15

Badie v. Bank of Am., 67 Cal. App. 4th 779 (1998) 16, 17

California Nat'l Bank v. Woodbridge Plaza LLC, 164 Cal. App. 4th 137 (2008) 16, 17

City of Hope Nat'l Med. Ctr. v. Genentech, Inc., 43 Cal. 4th 375 (2008) 15, 17

Clarendon Nat'l Ins. Co. v. Ins. Co. of the W., 442 F. Supp. 2d 914 (E.D. Cal. 2006), *aff'd*, 290 Fed. App'x 62 (9th Cir. 2008) 17

Cochran v. City of Los Angeles, 222 F.3d 1195 (9th Cir. 2000) 19

Estate of Blume v. Marian Health Ctr., 516 F.3d 705 (8th Cir. 2008) 8, 9, 19

Garcia v. Truck Ins. Exch., 36 Cal. 3d 426 (1984) 17

Hess v. Ford Motor Co., 27 Cal. 4th 516 (2002) 16

Martin Bros. Constr., Inc. v. Thompson Pac. Constr., Inc., 179 Cal. App. 4th 1401 (2009) 16

TABLE OF AUTHORITIES

	Page(s)
Med. Operations Mgmt., Inc. v. Nat'l Health Labs., Inc., 176 Cal. App. 3d 886 (1986)	16
Medtronic, Inc. v. White, 526 F.3d 487 (9th Cir. 2008)	27
Ortiz v. Jordan, No. 09-737 (U.S. Sup. Ct. Jan. 24, 2011)	1, 9, 13, 14, 19, 21, 22, 23, 24
Parsons v. Bristol Dev. Co., 62 Cal. 2d 861 (1965)	16
Qualls v. Lake Berryessa Enters., Inc., 76 Cal. App. 4th 1277 (1999)	17
Ruyle v. Cont'l Oil Co., 44 F.3d 837 (10th Cir. 1994)	20
Stanford Univ. Hosp. v. Fed. Ins. Co., 174 F.3d 1077 (1999)	27
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Winet v. Price, 4 Cal. App. 4th 1159 (1992)	15
Wolf v. Walt Disney Pictures & Television, 162 Cal. App. 4th 1107 (2008)	15, 17

Statutes and Rules

FED. R. EVID. 103	20

TABLE OF AUTHORITIES

	Page(s)
CAL. CIV. CODE §1638	27

Other Authorities

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Oral Argument Recording (July 12, 2010), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000005791	20
DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 377 (3d ed. 1997)	4
1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §741 (10th ed. 2005)	15, 17
11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *Appellate Review* §2818 (2d ed. 1995)	19

STATEMENT OF THE CASE

The Petition seeks to link this appeal to the issue now addressed in *Ortiz v. Jordan*, No. 09-737, by presenting a one-sided and incomplete account of the Ninth Circuit's opinion. F.B.T. recognizes that it is common practice to grant, vacate and remand ("GVR") appellate decisions that are even arguably impacted by an intervening Supreme Court opinion, so that the appellate court may decide in the first instance whether to alter its prior decision. If the Court takes that course here, the Court of Appeals will have no difficulty recognizing that the Court of Appeal's decision in this case rests on an entirely independent ground that is unrelated to and unaffected by *Ortiz*.

Recognizing that the Court may either determine for itself whether the decision rests on a ground that is independent of *Ortiz* or remand to the Court of Appeals so that it can make that determination, this brief will explain why the decision below is not undermined by *Ortiz*.

A. F.B.T. Discovers And Signs Eminem.

In the early 1990s, Mark and Jeff Bass discovered budding rapper Marshall B. Mathers, III p/k/a Eminem ("Eminem"). 3-ER-510:17-511:1. At that time, Eminem was a little-known rapper in Detroit. Over the next few years, Mark and Jeff Bass "groom[ed]" Eminem and let him record music in their facility. 3-ER-511:2-10, 514:17-515:4.[1] Several years later, in 1995, Mark and Jeff signed Eminem to

---

[1] "ER" refers to Respondents'/Appellants' Excerpts of Record filed in the Ninth Circuit.

their production company, F.B.T. Productions, LLC. Pet. App. 2a. F.B.T. and Eminem signed an "Exclusive Artist Recording Agreement" in which Eminem agreed to "render exclusive services to [F.B.T.] to furnish master recordings." 6-ER-1054.[2]

B. F.B.T. And Eminem Contract With Aftermath.

After signing Eminem to F.B.T. in 1995, Mark and Jeff Bass gathered funds to take Eminem to rap shows around the country so he could showcase his skills and generate "buzz." 3-ER-512:7-14. In 1997, Eminem performed at a show in California. A junior employee of Interscope Records, who was in attendance at that concert, obtained a copy of Eminem's CD and brought it to the then-president of Interscope, Jimmy Iovine. Shortly thereafter, Mr. Iovine gave Eminem's album to Andre Rommel Young, Jr., a/k/a Dr. Dre. Dr. Dre and Interscope were co-owners of a record label called Aftermath Records ("Aftermath"). 3-ER-494:19-21.[3] Dr. Dre liked what he heard, and within a few days F.B.T. entered into an agreement with Aftermath (the "1998 Agreement"), whereby F.B.T. agreed to furnish to Aftermath "the exclusive recording services of"

---

[2]Petitioners assert that F.B.T.'s efforts on behalf of Eminem were a "failure" (Pet. 2), but Petitioners fail to mention that F.B.T. has continued to produce much of Eminem's highly successful music and that F.B.T.'s members have won several Grammys and an Academy Award for their ongoing work with Eminem.

[3]Aftermath and its co-owners Interscope and UMG Recordings, Inc. ("UMG" or "Universal") are collectively referred to as "Petitioners."

Eminem. Pet. App. 2a; 5-ER-834; 3-ER-484:5-7.

The 1998 Agreement set forth the royalty payments that Aftermath would make to F.B.T. in various situations. Paragraph 4(a)(i) of the 1998 Agreement—the "Records Sold" provision—specified the royalty to be paid to F.B.T. when Eminem records were sold by Aftermath through normal retail channels in the United States. 5-ER-837 ¶4(a). This royalty rate ranged from 12% to 20% of the adjusted retail price depending on such factors as the aggregate number of records sold. *Id.*

Importantly, however, the 1998 Agreement went on to state that "notwithstanding the foregoing," a different royalty would be paid on "masters licensed by [Aftermath] . . . to others for their manufacture and sale of records or for any other uses." 5-ER-837-38 ¶¶4(c), (c)(v). This second provision—the "Masters Licensed" provision—set a significantly higher royalty rate of 50% of Aftermath's net receipts for all Eminem masters licensed to others by Aftermath.[4] 5-ER-838 ¶4(c)(v).

In 2003, Eminem and Petitioners entered into a new agreement that terminated the 1998 Agreement. Pet. App. 3a. The new agreement made a number of changes, but incorporated the terms of the Records Sold and Masters Licensed provisions of the 1998 Agreement. *Id.* at 3a-4a; 5-ER-898 ¶5(a)(i), 899 ¶5(c)(v). The 1998 and 2003 agreements are referred to collectively herein as the "Recording Agreements."

As a result of these contracts and amendments,

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[4]For the Court's convenience, the relevant sections of the contract are set forth in their entirety in the attached Appendix.

the current situation is as follows: Eminem and Aftermath have a direct relationship, and F.B.T. and Eminem both receive a portion of the royalties paid by Petitioners on Eminem's music. Pursuant to the Recording Agreements, the current royalty rate on "records sold" by Aftermath in the United States is 22-23% of the adjusted retail price. 5-ER-1011 ¶2(a). But "notwithstanding" the Records Sold provision, the royalty rate on "masters licensed by [Aftermath] . . . to others" is 50% of Aftermath's net receipts. 5-ER-837-38 ¶¶4(c), (c)(v).

C. Digital Online Music Services Explode Into The Music Industry And Petitioners Enter Into Licensing Agreements With Third Party Digital Download Providers.

In 1998, when the Records Sold and Masters Licensed provisions were adopted, online music services were in a nascent state. 4-ER-644:14-15; 3-ER-502:4-7.[5] Within the next few years, however, online digital music exploded. Napster and other "illegitimate online services that neither pa[id] artists nor record companies nor [sought] permission to use the

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[5]In 1997, Donald S. Passman, a prominent entertainment attorney wrote:

> At the time of this writing, it's not practical to download music very quickly. . . . A few years ago, Aerosmith did a promotion where they allowed a new single to be downloaded. For a record that was approximately two and one-half minutes in length, it took anywhere from 45 minutes to one and one-half hours to download the copy (depending on your modem speed). (DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 377 (3d ed. 1997))

music they exploit[ed]" began offering music to internet users in 1999. 6-ER-1250; 4-ER-644:19-20. And beginning in 2001, UMG began entering into contracts that granted third parties the right to legally reproduce and distribute UMG music to consumers over the internet. Pet. App. 3a; *see also, e.g.*, 2-ER-261 ¶86.

Since 2001, UMG has entered into hundreds of such licensing agreements with various third parties, granting those entities the rights to reproduce and distribute UMG music to consumers over the internet in various forms. 2-ER-261 ¶86; *see also, e.g.*, 5-ER-1013; 6-ER-1131, 1165. In the course of this litigation, UMG produced approximately eighty agreements granting various entities these rights to reproduce and sell UMG's music (including the Eminem masters) as permanent downloads and mastertones (*i.e.*, 30-second or less audio clips of a song that signal an incoming call on a cellphone). 4-ER-681, 688-95, 712-13. Although the contracts differ somewhat, most are similar in terms of the rights granted to the third parties and their general structure. Pursuant to these agreements, Petitioners do not sell anything to the download providers; the download providers do not obtain title of the digital files; ownership of all information remains with Petitioners; the download providers have no first sale rights; and Petitioners obtain recurring benefits from the single transaction. *See, e.g.*, 5-ER-1013; 6-ER-1165, 1256; *see also* 3-ER-554:17-557:8, 571:20-572:17.

By 2006, digital music sales reached an estimated trade value of $2 billion, which accounted for approximately 10% of total music sales for the year. INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 5 (2007), *available*

at http://www.ifpi.org/content/library/digital-music-report-2007.pdf.

D. F.B.T. Discovers That Petitioners Have Been Underpaying Royalties And Initiates This Lawsuit.

In February 2006, a royalty audit for the period from January 1, 2002, through June 30, 2005, revealed that Petitioners were paying F.B.T. royalties for permanent downloads and mastertones based on the rates set forth in the Records Sold provision of the Recording Agreements instead of the rates set forth in the Masters Licensed provision. Pet. App. 4a. Accordingly, on May 21, 2007, F.B.T. filed a complaint seeking breach of contract damages and a declaratory judgment based on Petitioners' underpayment for digital download royalties. 2-ER-36.[6]

E. District Court Proceedings.

1. Pre-Trial Proceedings.

On December 3, 2008, both parties moved for partial summary judgment.[7] Ninth Circuit Clerk's

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[6]The complaint was subsequently amended to add an additional claim (Count II) related to the allocation of costs between F.B.T. and Eminem. F.B.T. prevailed on Count II, and Petitioners did not appeal that result to the Ninth Circuit. Count II is therefore not at issue in this Petition.

[7]F.B.T.'s motion was not explicitly labeled a motion for partial summary judgment, but that is what it was. The motion sought a ruling adopting its contract interpretation; the motion did not seek a ruling on the amount of damages to which it would be entitled under that interpretation. 2-ER-149-78. Had

(continued . . .)

Record 170, 175. In its motion, F.B.T. asked the court to rule as a matter of law that the Masters Licensed provision applied to permanent downloads and mastertones. 2-ER-170-72. Shortly thereafter, F.B.T. filed a Memorandum of Contentions of Fact and Law setting forth its claims and the evidence supporting them, and also identifying "issues of law" F.B.T. anticipated the court would decide, including "[w]hether defendants' relationships with permanent download and Mastertone providers constitute licenses of the Eminem masters" and, if so, "whether the Master License provision of the 1998 and 2003 Recording Agreements specifies the applicable royalty." 2-ER-232-35.

The District Court denied both parties' summary judgment motions on January 20, 2009 (one month before trial began). In its decision, the court stated that summary judgment was only appropriate if the agreements were "unambiguous" and not "reasonably susceptible to more than one interpretation." Pet. App. 43a, 49a-50a.

2. Trial, Judgment And Post-Trial Rulings.

Trial commenced on February 20, 2009. After several days of testimony, the case was submitted to the jury on March 5, 2009. The next day, the jury returned a general verdict for Petitioners on Count I and for F.B.T. on Count II. 4-ER-722; 5-ER-832. On

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(. . . continued)
FBT's motion been granted, there would have to have been a further proceeding—either motion practice or a trial—to determine damages.

March 17, 2009, the District Court entered an order on Count III (declaratory relief claim relating to Petitioners' underpayment of royalties for digital downloads) and final judgment on all three counts. 1-ER-33, 31.

F.B.T. did not file a motion for judgment as a matter of law ("JMOL"). Its motion for new trial (Ninth Circuit Clerk's Record 533, 534) was denied. 1-ER-20. F.B.T. appealed.

F. Appellate Proceedings.

1. F.B.T.'s Argument On Appeal.

On appeal, F.B.T. argued that, as a matter of law, the Masters Licensed provisions of the Recording Agreements applied to Petitioners' licenses to digital download providers such as Apple's iTunes (as well as to mastertones). F.B.T. explained that because there was no material extrinsic evidence, and in any event no conflict in that evidence, the proper interpretation of the Recording Agreements was a question of law that the Court of Appeals could and should resolve *de novo* even though F.B.T. had made no JMOL motion. F.B.T. further explained that the JMOL motion requirement arises only when a litigant wishes to preserve a claim that there is insufficient evidence to support the judgment. *See* Respondents' Ninth Circuit Opening Brief 21-26; Respondents' Ninth Circuit Reply Brief 20-23.

In a supplemental letter to the Court filed a week before oral argument, F.B.T. cited additional cases holding that where contract interpretation is a question of law, the failure to make a motion for JMOL does not waive the right to present that issue on appeal from the judgment. *See, e.g.*, *Estate of Blume v. Marian Health Ctr.*, 516 F.3d 705, 707 (8th Cir.

2008) (noting that "the interpretation of a contract is a question of law for the court to decide, and a party has no obligation to raise a legal issue post-trial in order to preserve it for appeal") (citation and internal quotation marks omitted). F.B.T.'s letter also supported its argument that the contract interpretation issue had been preserved by referring to a separate line of cases that permit a post-trial appeal from the denial of summary judgment where the ruling was based on an issue of law. Pet. App. 56a.

2. Petitioners' Motion To Defer Pending *Ortiz* Is Denied.

Following oral argument, Petitioners filed a motion to defer submission of the appeal. Petitioners argued that the court should not consider the cases cited in F.B.T.'s supplemental letter permitting a post-trial appeal from the denial of summary judgment because F.B.T.'s briefs did not explicitly ask the court to review the denial of summary judgment. They also argued that submission should be deferred pending this Court's decision in *Ortiz* because decision in that case could alter or eliminate the "issue of law exception" at issue in the cited cases.

In opposition, F.B.T. explained that the eventual ruling in *Ortiz* could not possibly affect F.B.T.'s argument that interpretation of the Masters Licensed provision is a question of law that the court was required to determine *de novo* even though F.B.T. had made no motion for JMOL on that issue of law. F.B.T. also argued that it was unlikely this Court's decision in *Ortiz* would sweep so broadly as to completely eliminate the "issue of law exception" for summary judgment denials based on pure issues of

law. The Court of Appeals denied Petitioners' motion.

3. The Ninth Circuit Unanimously Reverses The Judgment.

In an opinion by Judge Silverman, the Ninth Circuit unanimously reversed the judgment, upholding Petitioners' interpretation of the contract and remanding for further proceedings. As explained below, its ruling will require a new trial to determine damages.

The Petition characterizes the opinion below as resting solely on the right of a litigant to appeal after judgment from the denial of a motion for summary judgment. Pet. 10-11. That is an incomplete and inaccurate description of the opinion. In fact, the Ninth Circuit decision rests on its confirmation, consistent with well-settled precedent, that an issue of law (in this case, contract interpretation) need not be raised in a JMOL motion to preserve it for an appeal from a final judgment, as long as the issue was properly raised at some appropriate point before the case went to the jury. Pet. App. 5a-6a. The court went on to explain that F.B.T. had properly raised the legal argument (that the Masters Licensed provision applies to electronic downloads as a matter of law) in its summary judgment motion. *Id.* at 6a.[8]

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[8]Although not mentioned by the Court of Appeals, F.B.T. also flagged this issue prior to trial in its Memorandum of Contentions of Facts and Law, wherein F.B.T. identified "issues of law" it anticipated the court would decide, including "[w]hether defendants' relationships with permanent download and Mastertone providers constitute licenses of the Eminem masters" and, if so, "whether the Masters License provision of

(continued . . .)

The court bolstered its conclusion that the merits of the contract interpretation issue were before it by citing the Ninth Circuit rule that a District Court's denial of summary judgment is subject to review on appeal if the court made an error of law. *Id.*[9]

Turning to the merits, the Ninth Circuit first interpreted the contract on its face, without reference to the extrinsic evidence presented by either party. *See* Pet. App. 8a-13a. It held that whenever the Masters Licensed provision applies, the Records Sold provision does not. *Id.* at 8a-9a. It further held that the Masters Licensed provision unambiguously applies to *all* licenses (*id.* at 8a-9a, 14a) and that, as a matter of law, Petitioners' contracts with third party digital download providers are licenses. *Id.* at 9a-12a. In other words, the court agreed that under the plain language of the Recording Agreements, permanent downloads and mastertones are covered by the Masters Licensed provision and that royalties should have been paid at the higher 50% rate.

The opinion then rejects as legally irrelevant the extrinsic evidence Petitioners had cited in support of

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(. . . continued)
the 1998 and 2003 Recording Agreements specifies the applicable royalty." 2-ER-232-35.

[9]The court's discussion of the right to appeal a summary judgment denial was either intended to provide further support for its conclusion that a JMOL motion was not necessary to preserve the contract issue for appeal *or* as an alternative ground for its determination that the merits of that issue were before it. However characterized, the opinion includes a square *holding*, entitled to precedential effect, that the contract interpretation issue was properly before the Court of Appeals even though no JMOL motion had been made. The Petition fails to describe that holding. Pet. App. 5a.

its contention that the Masters Licensed provision did not apply to digital downloads. This consisted of (1) undisputed evidence of industry practice at the time of contracting applying the Masters Licensed provision to licenses for use of recorded music in motion pictures, television and compilation albums; and (2) undisputed evidence that F.B.T. had not objected to royalty payments until 2006. Pet. App. 13a-14a. The Court held that this evidence was "undisputed" (*id.* at 14a) and, as a matter of law, did not support Petitioners' interpretation. *Id.*[10]

4. Petitioners' Motion For Rehearing And Rehearing *En Banc* Is Denied.

Following the Court of Appeals' reversal, Petitioners filed a petition for rehearing and rehearing *en banc*. Petitioners once again asserted that the "issue of law exception" to the rule precluding post-trial appellate review of summary judgment denials could be eliminated by this Court's anticipated deci-

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[10]The Petition is incorrect, and misdescribes the opinion, when it says that "[t]he Ninth Circuit had to review *the competing evidence, including expert testimony on recording industry custom and practice,* before it could conclude that there was a mistake of law." Pet. 21 (emphasis added). In fact, the opinion agreed with F.B.T.'s contract interpretation without any discussion of the extrinsic evidence; it then held that Petitioners' extrinsic evidence was irrelevant and inadmissible. The opinion rejected the industry practice evidence as irrelevant because at the time of contracting, permanent downloads and mastertones did not exist. Pet. App. 13a. It rejected the failure-to-protest evidence as irrelevant because there was no evidence of acquiescence between 2003 and 2006, and F.B.T. promptly raised the issue with Petitioners immediately after the 2006 audit. *Id.* at 14a.

sion in *Ortiz* and argued, *inter alia*, that even if the exception were to be upheld, it would not apply to this case because the contract interpretation issue is not a pure question of law. The Ninth Circuit denied the petition.

REASONS FOR DENYING THE WRIT

Petitioners ask this Court to hold this Petition pending resolution of *Ortiz v. Jordan* (and presumably to GVR now that *Ortiz* has been decided). Pet. 14-18. This request rests on the faulty premise that "[t]his case presents the same basic appealability issue that the Court is considering in *Ortiz v. Jordan*." *Id.* at 1. It does not.

The central issue presented in this appeal was whether, as a matter of law, the Masters Licensed provisions of the Recording Agreements applied to all licenses of Eminem's master recordings, including licenses to digital download providers such as Apple's iTunes. As explained below, under well-settled California contract interpretation principles, this issue of contract interpretation is a purely legal question. *See* Part I(A), *infra*.

F.B.T.'s contention in its appeal briefs was that otherwise preserved issues of law—such as contract interpretation in the absence of a material dispute of extrinsic fact—may be raised on appeal from a final judgment without regard to whether a JMOL was made at trial. This well-settled rule, which was accepted and applied by the Ninth Circuit (Pet. App. 5a), is not called into question by the recent opinion in *Ortiz*. *See* Part I(B), *infra*.

The *only* area in which *Ortiz* could possibly be relevant is with respect to the additional considera-

tion (or, possibly, alternative ground; *see* note 9, *supra*) discussed by the Ninth Circuit: a litigant's right under Ninth Circuit precedent to appeal on an issue of law after trial from the denial of summary judgment. But even if *Ortiz* completely eliminated that justification—even for pure issues of law—the Ninth Circuit's opinion remains sound because it rests independently on a principle that Petitioners have themselves *conceded* (*see* pp.20-21, *infra*): that a JMOL motion is not necessary to preserve the right to appeal from the judgment on a pure issue of law. *See* Part I(C), *infra*.

Finally, Petitioners also ask this Court to summarily reverse the Ninth Circuit's decision. Pet. 29-35. But Petitioners have not cited a single decision of this Court supporting its claim of error. The opinion below is consistent with Ninth Circuit precedent and with California substantive contract law. *See* Part II, *infra*.

I.

ORTIZ DOES NOT UNDERMINE THE NINTH CIRCUIT'S DECISION, WHICH RESTS ON A GROUND INDEPENDENT OF THE ISSUE RESOLVED IN *ORTIZ*.

A. The Proper Interpretation Of The Recording Agreements Is A Pure Question Of Law.

Petitioners devote substantial energy to arguing that the distinction between questions of law and questions of fact is "elusive[]." Pet. 19-20. While this may be true in some jurisdictions, or in some con-

texts, it is demonstrably incorrect with respect to contract interpretation litigation under California law, which precisely delineates when contract interpretation is a question of law and when it is not.

Under well-settled California law, the interpretation of a contract involves a two-step process:

> First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties' intentions to determine "ambiguity," i.e., whether the language is "reasonably susceptible" to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is "reasonably susceptible" to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step—interpreting the contract. (*Winet v. Price*, 4 Cal. App. 4th 1159, 1165 (1992))

California cases are crystal clear that the question of whether to admit the proffered extrinsic evidence, and the attendant question of whether that evidence renders the contract ambiguous, are both questions of law. *Abers v. Rounsavell*, 189 Cal. App. 4th 348, 357 (2010); 1 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Contracts* §741 (10th ed. 2005) ("1 B. WITKIN") ("The trial court's determination of whether an ambiguity exists in a contract is a question of law, subject to independent review on appeal").

California cases are equally clear that where extrinsic evidence is not finally admitted, interpretation of the contract must be based on the language of the contract itself, and is a pure question of law which trial courts determine in the first instance, and appellate courts re-determine *de novo*. *City of Hope Nat'l Med. Ctr. v. Genentech, Inc.*, 43 Cal. 4th 375, 395 (2008); *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107, 1126-27, 1134

(2008).

Moreover, even when extrinsic evidence has been finally admitted, the ultimate interpretation of the contract remains a question of law unless there are material factual disputes as to "foundational extrinsic evidence." *See Parsons v. Bristol Dev. Co.*, 62 Cal. 2d 861, 865 (1965); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 799 (1998); *Med. Operations Mgmt., Inc. v. Nat'l Health Labs., Inc.*, 176 Cal. App. 3d 886, 891 (1986). The term "foundational extrinsic evidence" refers to disputes over the historic facts—*i.e.*, disputes about "the credibility of extrinsic evidence" (*id.* (citation and internal quotation marks omitted)), such as whether a particular letter was sent, or a particular statement made, during the contract negotiation, the parties' post-contracting conduct or relevant industry "custom and practice." *See, e.g.*, *Hess v. Ford Motor Co.*, 27 Cal. 4th 516, 527 (2002); *Martin Bros. Constr., Inc. v. Thompson Pac. Constr., Inc.*, 179 Cal. App. 4th 1401, 1416 (2009). A critical feature of California law is that contract interpretation remains an issue of law even where disputes exist about the *inferences* to be drawn from that extrinsic evidence:

> [I]t is only when conflicting inferences arise from conflicting [extrinsic] evidence, not from uncontroverted evidence, that the trial court's resolution is binding. The very possibility of . . . conflicting inferences, actually conflicting interpretations, far from relieving the appellate court of the responsibility of interpretation, signalizes the necessity of its assuming that responsibility. (*Med. Operations Mgmt., Inc.*, 176 Cal. App. 3d at 891 (citation and internal quotation marks omitted))

See also California Nat'l Bank v. Woodbridge Plaza

LLC, 164 Cal. App. 4th 137, 143 (2008) (trial court's interpretation of commercial lease was a question of law reviewed *de novo* even though parties offered testimony of their differing interpretations of the lease); *Garcia v. Truck Ins. Exch.*, 36 Cal. 3d 426, 439 (1984) ("It is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, *even when conflicting inferences may be drawn*") (emphasis added).

In sum, under well-settled California law, interpretation of a contract is a pure question of law for both trial and appellate courts to determine unless there is a material extrinsic fact dispute.[11] And the threshold question of whether a material dispute of extrinsic fact exists is itself a pure question of law. *See, e.g.*, 1 B. WITKIN, §741.

In its appeal, F.B.T. asserted an interpretation of the Recording Agreements based on the contract language itself. The Court of Appeals likewise based its interpretation of the contract on the contract language itself, without recourse to extrinsic evidence. *See* p.11, *supra*. The only discussion of extrinsic evidence was in the Court of Appeals' explanation of its rejection of *Petitioners'* attempt to invoke the

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[11]Cases standing for the proposition that interpretation of a contract is a question of law unless there are material extrinsic fact disputes are legion. *See, e.g., United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992); *Clarendon Nat'l Ins. Co. v. Ins. Co. of the W.*, 442 F. Supp. 2d 914, 922 (E.D. Cal. 2006), *aff'd*, 290 Fed. App'x 62 (9th Cir. 2008); *City of Hope Nat'l Med. Ctr.*, 43 Cal. 4th at 395; *Parsons*, 62 Cal. 2d at 865-66; *Wolf*, 162 Cal. App. 4th at 1126-27, 1134; *Qualls v. Lake Berryessa Enters., Inc.*, 76 Cal. App. 4th 1277, 1283 (1999); *Badie*, 67 Cal. App. 4th at 799.

material dispute of extrinsic fact exception to make interpretation of the contracts a question of fact rather than law. *Id.* The only purported material extrinsic fact dispute cited in Petitioners' briefs was allegedly conflicting expert testimony concerning industry custom and practice. Petrs.' Ninth Circuit Brief 37-38. Under controlling California law, whether this expert testimony was relevant and admissible, and whether it created a material extrinsic fact dispute that made contract interpretation an issue of fact, were questions of law (*see* pp.15-17, *supra*) that the Court of Appeals answered in the negative—finding that (1) the extrinsic evidence "did not support Aftermath's interpretation that the Records Sold provision applies" (Pet. App. 14a-15a); *see also id.* at 13a; and (2) the extrinsic evidence was "undisputed" (*id.* at 14a). In the absence of any material extrinsic fact dispute, interpretation of the Recording Agreements remained, at all times, a question of law.

Accordingly, the Ninth Circuit's decision rests upon two conclusions—both of which are pure questions of law under fundamental principles of contract interpretation in California: (1) there was no material dispute of extrinsic fact that rendered contract interpretation a question of fact; and (2) the language of the Recording Agreements "unambiguously provide[s] that . . . [Petitioners] owed F.B.T. a 50% royalty under the Masters Licensed provision for licensing the Eminem masters to third parties for any use," including permanent downloads and mastertones. Pet. App. 14a.

B. The Ninth Circuit's Ruling That Pure Questions of Law Need Not Be Raised In A JMOL Motion To Preserve The Issue For Appeal From A Final Judgment Is Not Affected By *Ortiz*.

As explained above (*see* p.10, *supra*) and discussed further below (*see* pp.21, 23-24, *infra*), the Court of Appeals held that it could reach the merits of the contract interpretation issue because an issue of law (in this case contract interpretation) can be reviewed on appeal from a final judgment even if it was not raised in a JMOL motion. There is ample precedential support for the Court of Appeals' conclusion, and nothing in *Ortiz* affects the well-settled rule upon which it relied.

A leading treatise on federal practice explains that "[t]he settled rule in federal courts . . . is that a party may assert on appeal any question that has been properly raised in the trial court." 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE, *Appellate Review* §2818, at 186 (2d ed. 1995). Courts across the country are also consistent in their application of this fundamental principle. *Estate of Blume v. Marian Health Ctr.*, 516 F.3d 705, 707 (8th Cir. 2008) (noting that "the interpretation of a contract is a question of law for the court to decide, and a party has no obligation to raise a legal issue post-trial in order to preserve it for appeal") (citation and internal quotation marks omitted); *Cochran v. City of Los Angeles*, 222 F.3d 1195, 1200 (9th Cir. 2000) (holding that an issue of law that "does not concern the sufficiency of the evidence presented to the jury" need not be raised in a motion for judgment as a matter of law to preserve the issue for appeal);

Ruyle v. Cont'l Oil Co., 44 F.3d 837, 841-42 (10th Cir. 1994) (explaining that the purpose of Rule 50 is to challenge "the sufficiency of the evidence rather than the correctness of questions of law," and holding that questions of law may be raised on appeal with or without a prior Rule 50 motion).[12]

Petitioners have cited no contrary case holding that consideration of an issue of law on appeal from a final judgment is precluded by failure to make a motion for JMOL. To the contrary, during oral argument before the Ninth Circuit, Petitioners' counsel acknowledged: "[I]t's true if it's a pure legal question you don't need to bring a JMOL motion." Oral Argument Recording (July 12, 2010), *available at* http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000005791. Even in their Petition, Petitioners concede that "a party may not always need to move for JMOL to preserve for appeal an argument that it was entitled to have an issue

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[12]It would be preposterous—and unduly burdensome on busy District Court judges—if a potential appellant were required to relitigate every prior legal ruling of the court with JMOL motions before and after verdict. There are a host of legal issues that may be decided during the course of the proceedings: the constitutionality of a statute, the validity of a regulation, preemption, *Noerr-Pennington* immunity, instructional error, improper admission or exclusion of evidence and, of course, contract interpretation. Judicial efficiency is hardly served by a technical requirement that every such legal issue be raised again. Such a rule would also conflict with the plain language of the Federal Rules of Evidence. *See* FED. R. EVID. 103 ("Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal").

resolved in its favor as a matter of law." Pet. 20 n.3.[13]

Applying this uncontroverted principle to the facts of this case, the Court of Appeals concluded that F.B.T. had not forfeited the right to raise its contract interpretation argument on appeal by failing to make a JMOL motion. The court explained that because F.B.T.'s argument raised an issue of law, and not a challenge to the sufficiency of the evidence, F.B.T. "did not have to present that argument in a motion for judgment as a matter of law." Pet. App. 5a. Rather, to preserve this issue of law for appeal, F.B.T. only needed to have "raise[d] the argument at some point before the judge submitted the case to the jury." *Id.* This, the Ninth Circuit found, F.B.T. had done in its summary judgment motion by asking the District Court to rule as a matter of law that the Masters Licensed provision applied to permanent downloads and mastertones. Pet. App. 5a-6a; *see* p.10, *supra*.

Accordingly, the Ninth Circuit proceeded to review

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[13]Petitioners cite to Justice Kennedy's remark during oral argument in *Ortiz* that there may be "'cases in which the failure of the court to give a requested [jury] instruction preserves the issue, and perhaps [a Rule] 50(b) [motion] is not required there.'" Pet. 20 n.3 (citation omitted). They try to minimize the import of this statement by claiming that F.B.T. "affirmatively disavowed" a proposed jury instruction that would have had the court construe the Recording Agreements. *Id.* In addition to being an incorrect characterization of the facts (*see* Part II(B), *infra*), Petitioners' attempt to distinguish Justice Kennedy's comment misses (or at least mischaracterizes) the point. Justice Kennedy was providing *an example* of an issue of law that would not need to be raised in a post-trial motion to preserve it for review. It is contrary to both common sense and law to claim that instructional error is the *only* legal issue that can be raised on appeal even if it was not raised in a JMOL.

contract interpretation *de novo* and concluded that the interpretation F.B.T. had consistently advanced throughout the proceedings was correct as a matter of law. Nothing in *Ortiz* undermines this result.

Nothing in the opinion affects the *de novo* standard of review applicable (under California law) to a question of contract interpretation where there are no extrinsic fact disputes. Likewise, nothing in *Ortiz* calls into question the well-established body of precedent holding that failure to make a JMOL motion only affects the right to appeal from a final judgment on the ground of insufficient evidence, and does not preclude review of a pure issue of law. In *Ortiz*, the Court first held that the petitioners could not appeal from the denial of their motion for summary judgment on grounds of qualified immunity. *Ortiz v. Jordan*, No. 09-737, slip op. 7-8 (U.S. Sup. Ct. Jan. 24, 2011). The Court then held that the petitioners were also precluded from appealing the final judgment against them because the judgment turned on the sufficiency of the evidence concerning several disputed facts (*id.* at 10 (listing the disputed factual issues)) and the petitioners had failed to file a post-trial JMOL motion. *Id.* at 9-11. The Court reaffirmed that absent a JMOL, "an appellate court is 'powerless' to review *the sufficiency of the evidence* after trial" (*id.* at 8 (emphasis added)), but nothing in the Court's opinion purports to impose a JMOL requirement on pure issues of law.

In short, this Court's opinion in *Ortiz* has no bearing on the Court of Appeals' conclusion that the jury's interpretation of the Masters Licensed provision after trial was a question of law that the appellate court was permitted, and indeed required, to review *de novo* on an appeal from the final judgment even though it was not raised in a JMOL motion.

Accordingly, a GVR in light of *Ortiz* will do nothing more than delay the inevitable vindication of F.B.T.'s rights under the Recording Agreements while unnecessarily consuming judicial resources on remand.

C. *Ortiz* Is Relevant Only To An Alternative Ground For Reaching The Merits Of The Contract Interpretation Issue.

The principles summarized at pp.19-21, *supra*, concerning *de novo* review of issues of law are independent of the line of cases cited in F.B.T.'s July 6, 2010 supplemental letter (Pet. App. 56a-57a) as additional support for its argument that no JMOL motion was required to preserve the contract interpretation issue. That letter referred to cases permitting a post-trial appeal from the denial of summary judgment where the ruling was based on an issue of law. Admittedly, the Ninth Circuit cited some of these cases. And admittedly, this Court's decision in *Ortiz* has undermined this line of cases. But the Ninth Circuit's opinion is *not* dependent on those cases or a litigant's right to challenge the denial of summary judgment in the appeal after judgment. At most, the Ninth Circuit's reference to the cases allowing appeal from the denial of summary judgment on an issue of law was an alternative ground for its determination that the merits of that issue were before it. *See* n.9, *supra*.

That this was an alternative ground, rather than an essential component of the decision below, is evidenced not just from the language of the opinion, but also by its denial of Petitioners' motion to defer submission whereby it refused to delay resolution of this case until the validity of that exception was ruled on by this Court. Moreover, that the Ninth Circuit

viewed its task as reviewing a question of law (namely, contract interpretation) on appeal from the final judgment—not the denial of summary judgment—is demonstrated by its review of the trial record.[14] Indeed, Petitioners say that "[t]he Ninth Circuit . . . [made] an extensive review of the evidentiary record [and, i]n particular, . . . reviewed the *trial* record, which underscores that something other than a review of a summary judgment decision (which presumably would focus on the summary judgment record) was afoot." Pet. 2 (emphasis in original). They are correct[15]: the Ninth Circuit properly reviewed an adequately preserved legal issue on appeal from the final judgment. A GVR is not necessary simply because *Ortiz* may have undermined an alternative ground for reaching the same result.

---

[14]To the extent the Ninth Circuit may have "erred . . . by incorrectly placing its ruling under a summary-judgment heading" (*Ortiz*, slip op. 3) by, for example, stating that "the district court erred in denying F.B.T. summary judgment" (Pet. App. 15a), this Court concluded in *Ortiz* that such an error is not "fatal[]." *Ortiz*, slip op. 3. What *was* fatal to the petitioners in *Ortiz* was the fact that their case turned on the sufficiency of the evidence, yet they failed to move for JMOL. Not so here.

[15]Similarly, F.B.T.'s appeal made no attempt to limit the relevant evidentiary record to the summary judgment papers; to the contrary, both parties' briefs made frequent reference to the trial record. *See, e.g.*, Respondents' Ninth Circuit Opening Brief 21-26; Petrs.' Ninth Circuit Brief 37-47.

II.

SUMMARY REVERSAL IS UNWARRANTED AND INAPPROPRIATE.

Petitioners also ask this Court to summarily reverse the Ninth Circuit's opinion on case-specific grounds which even they do not claim meet the usual standards for granting certiorari. They contend that the Court of Appeals ignored several "forfeitures" to reach an "anomalous" result. Pet. 29. Not so. The Ninth Circuit correctly reached and resolved the central contract interpretation issue presented in this case. There are no errors—let alone obvious and egregious errors—that warrant summary reversal.

A. No Appellate Forfeiture Prevented The Ninth Circuit From Reaching The Merits.

Petitioners first argue that the Ninth Circuit's decision should be reversed because F.B.T. "forfeited" the argument that the District Court wrongly denied summary judgment by failing to raise the argument in its briefs. Pet. 29-30. Whether or not F.B.T. forfeited *that* argument is irrelevant, for it fully preserved the argument on which it prevailed.

F.B.T. argued throughout the appeal that the court could reach the merits of the contract interpretation issue because where contract interpretation is a question of law, the failure to make a motion for JMOL does not waive the right to present that issue on appeal from the final judgment as long as the issue is raised prior to submission of the case to the jury. This independently sufficient argument was

raised in F.B.T.'s briefs, supported by cases cited in F.B.T.'s supplemental letter to the court, and discussed during oral argument. The Ninth Circuit's decision therefore does not depend upon F.B.T.'s citation of authorities holding that the denial of summary judgment was reviewable because it was based on a question of law. *See* Parts I(B)-(C), *supra.* F.B.T.'s alleged "forefeiture" of that additional argument is therefore irrelevant.

B. F.B.T. Did Not Waive Its Contract Interpretation Argument Through Its Asserted Acquiescence To Withdrawing Instruction 25A.

Petitioners' case-specific contention that F.B.T. affirmatively waived the argument that the court should interpret the contract as a matter of law by "disavowing" a proposed jury instruction interpreting the contrary for the jury is also incorrect. Pet. 30-32.

Prior to trial, the parties submitted a joint proposed jury instruction—Instruction No. 25A—to be filled out by the court, by which the court would instruct the jury as to any aspects of contractual interpretation it decided as a matter of law. Pet. App. 72a. Following submission of this instruction, however, the District Court denied both parties' motions for summary judgment. Subsequently, the District Court held a conference to settle the jury instructions. In response to a question by the court, counsel for F.B.T. agreed that in light of the court's findings in the summary judgment decision that there were conflicts in the extrinsic evidence and that the disputed contractual provisions were reasonably susceptible to different interpretations,

Instruction 25A was not applicable. 4-ER-627:6-7. Given the court's prior rulings, counsel's statement can only be understood as an acceptance of and respect for the fact that the court had made a definitive ruling that rendered the instruction (which was, by its own terms, to be filled out by the court and given only if the court itself interpreted the contract) inapplicable.

The Ninth Circuit's refusal to find the issue waived on this ground was entirely consistent with previous Ninth Circuit caselaw. In fact, the Ninth Circuit Court had just recently held that a similar expression of "agreement" did not constitute waiver of a party's objection to a jury instruction. In *Medtronic, Inc. v. White*, 526 F.3d 487, 495 (9th Cir. 2008), the appellant's counsel responded "I think that's fine," after the District Court read the disputed instruction. The Ninth Circuit nevertheless rejected the argument that counsel had waived any objection by "acquiescing" in the instruction. Petitioners cite no controlling caselaw from this Court that renders these decisions incorrect.

C. The Ninth Circuit's Ruling On The Merits Was Correct.

The words of the contract are the starting point for any contract interpretation. CAL. CIV. CODE §1638; *Stanford Univ. Hosp. v. Fed. Ins. Co.*, 174 F.3d 1077, 1083 (1999). Here, the plain meaning of the words leaves no doubt that the Masters Licensed provision covers *all* licenses, including licenses to third party digital media providers.

Paragraph 4(a) of the Recording Agreements—the "Records Sold" provision—specifies the royalty on "full-price records sold in the United States . . .

through normal retail channels." 5-ER-837 ¶4(a). If this provision stood alone as the only relevant provision in the contract, it presumably would apply to the permanent downloads at issue in this case. But the Records Sold provision does not stand alone. To the contrary, the Masters Licensed provision (which appears after the Records Sold provision) states that "[n]otwithstanding the foregoing," a different royalty rate applies for "masters licensed by us or our NRS Licensees to others for their manufacture and sale of records or for any other uses." 5-ER-837-38 ¶¶4(c), (c)(v).

The import of this additional language and structure is clear: if the words of the Records Sold provision and the Masters Licensed provision *both* fit a given transaction, then the Masters Licensed provision trumps the Records Sold provision. Respondents' Ninth Circuit Opening Brief 27-28. It is therefore irrelevant whether the words of the Records Sold provision would (but for the Masters Licensed provision) also apply to permanent downloads and mastertones. It is similarly irrelevant whether downloads are "records," and whether online retailers are "normal retail channels" within the meaning of the Records Sold provision—all of which are irrelevantly (and distractingly) discussed in the Petition. Pet. 33. The only relevant question is whether the Masters Licensed provision applies to all licenses to use—that is, to copy and disseminate—Petitioners' master recordings, and in particular to licenses of master recordings to third party digital media providers. If it does, the Records Sold provision is inapplicable by reason of the "notwithstanding the foregoing" proviso to the Masters Licensed provision.

By its own terms, the Masters Licensed provision

applies to "masters licensed by us . . . to others for their manufacture and sale of records or for any other uses." 5-ER-838 ¶4(c)(v). The Court of Appeals found (and Petitioners do not dispute) that the digital file provided to online retailers such as iTunes is a "master," and that the master is provided to the digital media providers "for their manufacture and sale of records." Accordingly, the Masters Licensed provision applies to *all* licenses to use Petitioners' copyrighted works, and in particular their licenses to third party digital media providers.

The Ninth Circuit's opinion on this state law question of contract interpretation is not "anomalous" (Pet. 29); it is correct.

CONCLUSION

The Petition should be denied.

DATED: February 9, 2011.

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APPENDIX

APPENDIX

1998 RECORDING AGREEMENT— RELEVANT EXCERPTS

4. (a) Your royalty rate (which is inclusive of all third parties, such as producers, artists, vocalists, and other persons entitled to royalties in connec-tion with the Masters), payable in respect of one hundred percent (100%) of U.S. Net Sales, computed at the applicable percentage, indicated below, of the Royalty Base Price, will be the following:

On full-price records sold in the United States:

(i) (A) LPs 1, 2 and 3: eighteen percent (18%) for the first five hundred thousand (500,000) net sales through normal retail channels in the United States ("USNRC Sales"), eighteen and one-half percent 18.5%) for USNRC Sales in excess of five hundred thousand (500,000) but not in excess of one million (1,000,000), and nineteen percent (19%) for USNRC Sales in excess of one million (1,000,000), computed pro-spectively on an LP-by-LP basis.

(B) LPs 4, 5, 6 and 7: nineteen percent (19%) for the first five hundred thousand (500,000) USNRC Sales, nineteen and one-half percent (19.5%) for USNRC Sales in excess of five hun-dred thousand (500,000) but not in excess of one million (1,000,000), and twenty percent (20%) for USNRC Sales in excess of one million (1,000,000), computed prospectively on an LP-by-LP basis.

(i) Twelve percent (12%) for records other than LPs.

* * * *

(c) Notwithstanding the foregoing:

(v) On masters licensed by us or our NRS Licenses to others for their manufacture and sale of records or for any other uses, your royalty shall be an amount equal to fifty percent (50%) of our net receipts from the sale of those records or from those other uses of the masters.

182 (3)

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

No. 10-768

In the
Supreme Court of the United States

AFTERMATH RECORDS (D/B/A AFTERMATH ENTERTAINMENT), INTERSCOPE RECORDS, UMG RECORDINGS, INC.,

Petitioners,

v.

F.B.T. PRODUCTIONS, LLC, EM2M, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

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February 22, 2011

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

REPLY BRIEF OF PETITIONERS 1

A. At A Minimum, This Court Should Grant, Vacate, And Remand In Light Of *Ortiz*. 3

B. In The Alternative, The Court Should Summarily Reverse. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

CASES

Ortiz v. Jordan,
No. 09-737 (U.S. Jan. 24, 2011)..... *passim*

REPLY BRIEF OF PETITIONERS

Since the Petition was filed, this Court issued its decision in *Ortiz v. Jordan*, No. 09-737 (U.S. Jan. 24, 2011). In *Ortiz*, this Court held that a party may not "appeal an order denying summary judgment after a full trial on the merits[.]" *Ortiz*, slip op. at 2. The decision below held the opposite: "We may therefore review the district court's denial of summary judgment despite full trial on the merits." Pet. App. 8a. Respondents do not dispute that this holding is contrary to *Ortiz*.

Respondents nonetheless attempt to avoid a GVR or summary reversal based on the fanciful notion that the Ninth Circuit also rested its decision on an "entirely independent" alternative ground. BIO 1. For two reasons, no such independent ground exists.

First, respondents cannot escape the explicit language of the decision below, which repeatedly makes clear that the Ninth Circuit reviewed and reversed the denial of summary judgment, and only that ruling. *See* Pet. App. 2a, 6a, 7a, 8a, 15a.

Second, respondents' "alternative" ground is entirely illusory. Respondents contend that "otherwise preserved issues of law . . . may be raised on appeal from a final judgment without regard to whether a JMOL [motion] was made at trial." BIO 13. But the key phrase is "otherwise preserved," and respondents do not contend that they "otherwise preserved" their argument *apart from their summary judgment motion*. What respondents now seem to be contending is that they were not so much appealing the denial of their summary judgment motion as pursuing an argument on appeal

"preserved" in their unsuccessful summary judgment motion. That is frivolous. This Court did not clarify the non-appealability of summary judgment denials in *Ortiz* only to allow appeals based on unsuccessful summary judgment arguments. Respondents' purported alternative ground fails *a fortiori*. A GVR is thus clearly appropriate.

As an alternative to a GVR, the Court should summarily reverse. The egregious mistakes below were not limited to the Ninth Circuit's review of the denial of summary judgment in circumstances indistinguishable from *Ortiz*. The Ninth Circuit committed distinct and reversible errors in ignoring well-established rules of forfeiture. Respondents do not dispute that they forfeited their argument for review of the denial of summary judgment by not raising it in their appellate briefs. Respondents rewrite the record in their attempt to explain away their affirmative disavowal of a jury instruction that would have interpreted the contract as a matter of law, and that attempt in any event ignores that respondents told the Ninth Circuit they were "*not* arguing" that it was error to submit the contract interpretation issue to the jury. Respondents prevailed on an argument they told the Ninth Circuit they were not making. The Ninth Circuit simply ignored all these forfeitures without even acknowledging them in its haste to overturn a jury verdict. These errors are sufficiently stark that they merit summary reversal.

A. At A Minimum, This Court Should Grant, Vacate, And Remand In Light Of *Ortiz*.

In *Ortiz*, this Court considered the question "whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits." *Ortiz*, slip op. at 6. The "answer is no." *Id.* at 2. The court of appeals here held the opposite almost verbatim: "We may therefore review the district court's denial of summary judgment despite full trial on the merits." Pet. App. 8a. Even respondents "admi[t]," with some understatement, that "this Court's decision in *Ortiz* has undermined" that holding. BIO 23. At a minimum, therefore, the Court should grant this petition, vacate the court of appeals' judgment, and remand for further consideration in light of *Ortiz*.

Respondents nonetheless argue that no GVR is warranted. According to respondents, the court of appeals also rested its holding that respondents' contract interpretation argument was properly before it on the purportedly independent ground "that otherwise preserved issues of law . . . may be raised on appeal from a final judgment without regard to whether a JMOL [motion] was made at trial." BIO 13. This alleged independent ground is illusory.

Throughout its opinion, the court of appeals made crystal clear what it was reviewing: the denial of summary judgment. In the introduction to its opinion, the court announced its ruling: "the district court should have granted summary judgment to [respondents]." Pet. App. 2a. The court held that respondents' failure to file a Rule 50 motion did not

matter because respondents "argued that the contract was unambiguous in [their] motion for summary judgment, and the district court denied the motion." Pet. App. 6a. Citing cases from respondents' belated Rule 28(j) letter, the Ninth Circuit then stated: "A district court's denial of summary judgment is subject to review on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would have required the district court to grant the motion.'" Pet. App. 6a. The court reiterated this holding as the conclusion to its reviewability discussion. Pet. App. 8a. And the court ended its opinion by declaring that "the district court erred in denying [respondents] summary judgment." Pet. App. 15a. It is therefore quite clear that the Ninth Circuit heard respondents' contract interpretation argument as an appeal of the denial of summary judgment — precisely what *Ortiz* holds is improper.[1]

Respondents' contention that the Ninth Circuit relied on a ground independent of the denial of summary judgment ultimately turns on a hopeless

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[1] To the extent respondents seek to avoid a GVR on the ground that the issue here is more "purely legal" than the issue in *Ortiz*, this Court should reject that argument as frivolous. The issue here shares the same critical feature as the issue in *Ortiz*: it cannot be decided without examining the evidence in the trial or summary judgment record. Even respondents acknowledge that the Ninth Circuit's reviewability holding rested on the conclusion that "there was no material dispute of extrinsic fact," BIO 18, and the decision below had to review the evidence before finding that respondents' view of the evidence was correct. *See* Pet. 21-23. It is Orwellian to call this a "pure question[] of law." BIO 18.

effort to distinguish between the *denial* of a motion for summary judgment and the unsuccessful legal arguments raised in the motion. Respondents point to the Ninth Circuit's statement that because respondents' argument raised an issue of law, respondents "did not have to present that argument in a motion for judgment as a matter of law. Rather, [respondents] had to raise the argument at some point before the judge submitted the case to the jury, which [they] did." Pet. App. 5a; *see* BIO 21. Respondents concede repeatedly that their argument that no JMOL motion was necessary assumes that they "otherwise preserved" their contract interpretation argument. BIO 13; *accord id.* at 10 (JMOL motion not necessary "as long as the issue was properly raised at some appropriate point before the case went to the jury"), 19 ("properly raised in the trial court"), 24 ("adequately preserved"). But respondents' concession that they were required to raise their contract interpretation argument "'at some point'" gives away the game because, in respondents' own words, the "point" at which they raised the argument was "in [their] *summary judgment motion*." BIO 21 (emphasis added).[2]

In other words, respondents' purported alternative ground independent of the denial of their

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[2] Respondents note in passing in their Statement that their trial brief "flagged" the contract interpretation issue as an issue of law that respondents "anticipated the court would decide." BIO 10 n.8. Respondents are correct not to make any argument based on this because "flagging" an issue in a trial brief but then never asking the court at trial to decide it is obviously insufficient. *See* Pet. App. 22a-25a.

summary judgment motion turns out to be the summary judgment motion itself.[3] But that argument fails *a fortiori*. The Court in *Ortiz* did not reject the appealability of the denial of an unsuccessful motion for summary judgment only to allow an appeal based on the anterior act of making the motion.[4]

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[3] Respondents' argument that objections to jury instructions or evidentiary rulings can preserve legal issues even without a separate JMOL motion, *see* BIO 19-21 & nn.12-13, is irrelevant. Respondents did not seek judgment in their favor in the court below based on arguments about jury instructions or evidentiary rulings, and respondents in any event did not object to the instruction that submitted the contract interpretation issue to the jury. *See* pp. 7-8, *infra*.

[4] The only other possible interpretation of respondents' position that the Ninth Circuit's summary judgment holding was unnecessary is that they mean to argue that *nothing* needs to be done to preserve an argument on an issue of law — not a motion for summary judgment, not a motion for JMOL, not anything else. That contention would not be serious. In what can only be studied imprecision, respondents refer repeatedly to the Ninth Circuit's *de novo* "review" of the "issue" of contract interpretation, *see* BIO 19, 21-24, as if courts of appeals "review" "issues" in the abstract, rather than decisions of lower tribunals that necessarily are tied to the record, arguments, and standards applicable at the procedural juncture in question. *See* Pet. 24-26 & n.5; *cf. Ortiz*, slip op. at 3 (explaining that immunity defense rejected at summary judgment remains available at trial, "but at that stage, the defense must be evaluated in light of the character and quality of the evidence received in court," not the "supersede[d] . . . record existing at the time of the summary judgment motion").

B. In The Alternative, The Court Should Summarily Reverse.

Respondents offer no real defense of the Ninth Circuit's inexplicable deviation from the normal rules of preservation and forfeiture. Respondents do not even attempt to argue that they sought review of the denial of their summary judgment motion in their appellate briefs. They contend only that this forfeiture was harmless because the decision below rested on the "independently sufficient argument" discussed above. BIO 25-26. But that supposed alternative ground is just as fictional when offered as an excuse for respondents' appellate forfeiture. *See* pp. 3-6, *supra*. This attempt to gin up an independent ground is a telling admission that respondents forfeited the only basis for appellate review on which the Ninth Circuit relied.

Respondents defend their declination of an instruction that would have interpreted the contract for the jury by contending that the summary judgment ruling made it futile to request such an instruction. According to the BIO, "counsel for [respondents] agreed that in light of the court's findings in the summary judgment decision . . . Instruction 25A was not applicable." BIO 26-27. It is no accident that this description does not quote the actual colloquy. It reads in full:

> The court: Is 25A not applicable?
>
> [Respondents' counsel]: Yeah, we believe 25A is not applicable.
>
> [Petitioners' counsel]: Yes, Your Honor. I think we are — it's our intention to make a motion at the close of the plaintiffs' case but — and pending

> — reserving our rights with respect to that motion, we would include it in the joint set.
>
> The court: All right. So — but we — let's just be nimble on the — on the couple that we're going to — you know, either going to delete or add on the fly so that we're ready to go.

CA9 ER627.

Respondents thus flatly declined this instruction, and their post-hoc contention that the district court's summary judgment ruling left them no choice but to decline it is belied by the record. Petitioners' own summary judgment motion had been denied too, yet petitioners understood that whether the court or the jury would interpret the contract depended on the course of events at trial. The court's express willingness to be "nimble" and consider whether to give an instruction interpreting the contract for the jury refutes the notion that it would have been futile for respondents to do anything other than agree that this instruction was not applicable. *See also* Pet. App. 24a (district court rejecting respondents' futility excuse in denying new trial). Petitioners explained this in the petition, *see* Pet. 32 n.6, and respondents' silence in response is deafening.

Moreover, respondents' revisionist history of the trial court proceedings is ultimately beside the point: respondents reiterated their disavowal of this instruction before the court of appeals by stating that they were "*not* arguing that the judgment must be reversed and the case remanded for a new trial because the District Court erroneously submitted the contract interpretation question to the jury." Resp. CA9 Reply Br. 23 (emphasis in original).

Litigants are not supposed to win cases based on what they are "*not* arguing," but that is precisely what happened here.

The explanation for this complete disregard of the normal rules of forfeiture remains a mystery. The Ninth Circuit neither acknowledged nor explained its departure from those rules. That is the very definition of arbitrariness and merits the extraordinary step of summary reversal. That disposition would vindicate not only the basic rules of litigation and the rights of petitioners, but also the proper respect for the province of the jury.

CONCLUSION

The Court should grant, vacate, and remand in light of *Ortiz*. In the alternative, this Court should summarily reverse the Ninth Circuit's judgment.

Respectfully submitted,

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February 22, 2011

FILED
APR 15 2011

No. 10-768

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AFTERMATH RECORDS (D/B/A AFTERMATH ENTERTAINMENT), INTERSCOPE RECORDS, UMG RECORDINGS, INC.,

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v.

F.B.T. PRODUCTIONS, LLC, EM2M, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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April 15, 2011

CORPORATE DISCLOSURE STATEMENT

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TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i
TABLE OF AUTHORITIES iii
PETITION FOR REHEARING 1
GROUNDS FOR REHEARING 1
CONCLUSION 9
CERTIFICATE OF COUNSEL

TABLE OF AUTHORITIES

Page(s)

CASES

Banuelos v. Constr. Laborers' Trust Funds for S. Cal.,
382 F.3d 897 (9th Cir. 2004) 2, 3

Cohen v. Beneficial Indus. Loan Corp.,
337 U.S. 541 (1949) 6

First Nat'l Mortgage Co. v. Fed. Realty Inv. Trust,
631 F. 3d 1058 (9th Cir. Feb. 1, 2011) 4, 5

McCollough v. Johson, Rodenburg & Lauinger, LLC,
-- F.3d --, 2011 WL 746892
(9th Cir. Mar. 4, 2011) 4, 5, 7, 8

Ortiz v. Jordan,
131 S. Ct. 884 (2011) ..... *passim*

Rubin v. Peterson,
-- F.3d --, 2011 WL 1125556
(7th Cir. Mar. 29, 2011) 7

Unitherm Food System, Inc. v. Swift-Eckrich, Inc.,
546 U.S. 394 (2006) 2

STATUTES AND RULES

Fed. R. Civ. P. 50 2

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(a), 1602-1611 7

S. Ct. Rule 44.2 1

PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, petitioners respectfully petition for rehearing of the Court's March 21, 2011 order denying the petition for certiorari. Petitioners request that the Court grant rehearing for the purpose of granting the petition for certiorari, vacating the court of appeals' judgment, and remanding for further consideration in light of this Court's January 24, 2011 decision in No. 09-737, *Ortiz v. Jordan*, 131 S. Ct. 884.

GROUNDS FOR REHEARING

In *Ortiz*, this Court considered the question "whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits." 131 S. Ct. at 891. The "answer is no." *Id.* at 889. The Ninth Circuit's decision in this case squarely held the opposite: "We may therefore review the district court's denial of summary judgment despite full trial on the merits." Pet. App. 8a. Petitioners respectfully submit that rehearing is justified because these seemingly irreconcilable holdings present a compelling case for a GVR in light of *Ortiz*, and post-*Ortiz* decisions of the courts of appeals not previously presented to this Court underscore that the decision below cannot be reconciled with *Ortiz*.

1. The suit underlying this petition concerns the appropriate calculation of royalties from online sales of songs by popular recording artist Eminem. The key substantive issue at summary judgment, at trial, and on appeal was which of two royalty provisions in the parties' contract applied to sales of permanent downloads. Petitioners contended that permanent

downloads were covered by the contract's general royalty provision for sales through normal retail channels. Respondents contended that the contract's higher royalty rate for "Masters Licensed" applied. Both sides moved for summary judgment, each relying on evidence of industry practice to support its interpretation of the contract. *See* Pet. 2-5.

The district court denied both sides' motions for summary judgment because it found that "the parties' conflicting evidence create[d] a triable issue of fact." Pet. App. 47a. The parties then presented their conflicting evidence at trial. Respondents did not move for judgment as a matter of law, either before or after the case went to the jury. The jury found that petitioners' interpretation was correct. Having failed to move for judgment as a matter of law under Fed. R. Civ. P. 50, respondents could not challenge the denial of that relief on appeal. *Cf. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). Respondents thus eventually told the Ninth Circuit that they were "really appealing from the denial of summary judgment." *See* Pet. 9.

Before *Ortiz*, the Ninth Circuit had held that the denial of summary judgment could be appealed under some circumstances after a jury trial on the merits. *See, e.g., Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004). Applying that circuit precedent, the court of appeals held that respondents' failure to file a Rule 50 motion did not matter and that it could consider their contract interpretation argument as an appeal from the denial of their summary judgment motion and reversed the jury verdict. *See* Pet. App. 5a-8a.

The decision below and *Ortiz* therefore appear to be irreconcilable. The decision below explicitly permitted a post-trial appeal of a denial of a summary judgment motion: "A district court's denial of summary judgment is subject to review on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would have required the district court to grant the motion.'" Pet. App. 6a (quoting *Banuelos*, *supra*). While this petition was pending, this Court held in *Ortiz* that such an order is not appealable after trial. *See Ortiz*, 131 S. Ct. at 889 (answering "no" to the question whether a party may "appeal an order denying summary judgment after a full trial on the merits"). If *Ortiz*'s holding that the denial of summary judgment may not be appealed after a jury trial on the merits states a general rule applicable across the spectrum of civil cases, rather than a rule limited to the qualified-immunity context with its unique set of rules for interlocutory appeals, then the decision below would squarely conflict with *Ortiz* and a GVR would appear to be plainly warranted.

2. The conflict between *Ortiz* and the decision below is sufficiently stark that petitioners can only surmise that the Court denied the petition in this case, rather than issuing a GVR, based on a view that *Ortiz* is limited to the qualified-immunity context. Nothing in *Ortiz* suggests that it is so limited, however, and even respondents did not argue against a GVR on such a ground. Now, moreover, the Ninth Circuit itself has applied *Ortiz* outside the qualified-immunity context.

In an opinion issued after petitioners filed their reply, the Ninth Circuit held that the district court's

denial of a motion for summary judgment was not appealable, citing *Ortiz* for the proposition that, after a trial, the denial of summary judgment "is not reviewable on appeal." *See McCollough v. Johnson, Rodenburg & Lauinger, LLC*, __ F.3d __, 2011 WL 746892, *12 n.4 (9th Cir. Mar. 4, 2011). *McCollough* had nothing to do with qualified immunity; it involved a claim under the Fair Debt Collection Practices Act and related state-law claims for malicious prosecution and abuse of process. The opinion, joined by Justice O'Connor, held that the court of appeals' review was limited to the denial of the defendants' motion for judgment as a matter of law, and it relied exclusively on *Ortiz* for that proposition. *Id.*

Just a few weeks earlier, in stark contrast, the Ninth Circuit had applied its decision in this case in a way that makes crystal clear that the rule that the court applied in the decision below was entrenched as circuit precedent — until *Ortiz*. *See First Nat'l Mortgage Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1064-65 (9th Cir. Feb. 1, 2011).[1] *First*

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[1] In *First National*, *id.*, the Ninth Circuit relied on the decision below explicitly and heavily for the proposition that the denial of summary judgment is appealable after trial:

> At the outset, we reject First National's argument that because there was a full trial on the merits, Federal Realty is precluded from challenging the district court's denial of its motions for summary judgment. *See F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 963 (9th Cir. 2010) ("A district court's denial of summary judgment is subject to review on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would

National demonstrates that the decision below was not somehow case-specific or idiosyncratic in the pre-*Ortiz* world.[2] And the Ninth Circuit's intervening decision in *McCollough* demonstrates that *Ortiz* has superseded the decision below as the applicable law in the Ninth Circuit. Moreover, *McCollough* underscores that at least one panel of the Ninth Circuit, in what is now circuit law in the post-*Ortiz* world, does not read *Ortiz* as limited to the qualified-immunity context. As a result, there is no rational reason not to GVR this case to allow the court of appeals to apply *Ortiz* to this case in the same manner it is applying *Ortiz* in other cases.

3. Petitioners submit that the Ninth Circuit in *McCollough* was clearly correct in interpreting *Ortiz* as not limited to the qualified-immunity context.

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have required the district court to grant the motion.'" (citation omitted)). Moreover, to preserve this issue for appeal, Federal Realty did not have to present it in a motion for judgment as a matter of law. *See id.* at 962-63 (holding that an issue of law that "does not rest on the sufficiency of the evidence to support the jury's verdict" need not be raised in a motion for judgment as a matter of law to preserve the issue for appeal). Rather, all Federal Realty had to do was "raise the argument at some point before the judge submitted the case to the jury," which it did. *See id.* at 963. Accordingly, the district court's determinations that portions of the Final Proposal were ambiguous are "'question[s] of law, subject to independent review on appeal.'" *See id.* (citation omitted).

[2] *First National* was decided one week after *Ortiz*, but the Ninth Circuit did not cite *Ortiz*, and it appears that the parties did not bring *Ortiz* to the Ninth Circuit's attention in that very short intervening time period.

Nothing in this Court's opinion suggests such a limitation.

When the Court described the question presented at the outset of the opinion, the Court did so in generally applicable terms and did not mention qualified immunity: "We granted review . . . to decide a threshold question on which the Circuits are split: May a party, as the Sixth Circuit believed, appeal an order denying summary judgment after a full trial on the merits? Our answer is no." 131 S. Ct. at 888-89 (footnote omitted). The Court then justified that conclusion in generally applicable terms as well, explaining that "[t]he order retains its interlocutory character as simply a step along the route to final judgment." *See id.* at 889. And for that proposition, the Court cited a case involving a stockholder derivative action — not a qualified-immunity case. *See id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). When the Court restated the question presented, it again did not suggest that it was in any way limited to the qualified-immunity context: "We granted certiorari to resolve the conflict among the Circuits as to whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits." *Id.* at 891.

Nor does Justice Thomas's opinion concurring in the judgment, joined by Justice Scalia and Justice Kennedy, suggest such a limitation. *See* 131 S. Ct. at 893 ("We granted certiorari to decide the narrow question whether a party may appeal an order denying summary judgment after a full trial on the merits. I agree with the Court that the answer is no."). The merits briefs and oral argument likewise

made clear that the question in *Ortiz* did not turn on procedural rules unique to qualified immunity. *See* Pet. 14-15. Indeed, even respondents did not oppose a GVR on such a ground.

Nonetheless, at least one circuit has arguably suggested (in a decision post-dating the denial of the petition here) that *Ortiz* is limited to the qualified-immunity context. *See Rubin v. Peterson*, __ F.3d __, 2011 WL 1125556, *7 n.9 (7th Cir. Mar. 29, 2011) (describing *Ortiz* in terms specific to qualified immunity). That aspect of *Rubin*, unlike *McCollough*'s reliance on *Ortiz*, is only dictum.[3]

But the critical point is not whether *Rubin* or *McCollough* reflects the better view. Whether *Ortiz* contains such a limitation is a question that should be and will be worked out by the lower courts in the first instance. The critical point is that there is no reason that this case should not be part of the process of the lower courts working this question out. Even if *Ortiz* does not make clear that its holding applies beyond the qualified-immunity

[3] *Rubin* held that an order denying immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(a), 1602-1611, that could have been, but was not, immediately appealed, could be appealed as part of an appeal of a subsequent order where the first order had not been mooted or superseded by the subsequent proceedings. 2011 WL 1125556, at *5-7. The court explained that in *Ortiz*, in contrast, the denial of summary judgment could not be appealed after trial because the qualified-immunity defense had to be renewed and litigated at trial. *Id.* at *7 n.9; *see also Ortiz*, 131 S. Ct. at 889 ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.").

context, it certainly does not clearly foreclose that result, as evidenced by the Ninth Circuit's holding in *McCollough*. Accordingly, this is not a situation where the result of the lower court's reconsideration on remand is foreordained such that a GVR would serve no purpose.

At bottom, the question presented by this rehearing petition is whether petitioners and this case should be excluded as the lower courts grapple with *Ortiz*. Especially now that the court below has applied *Ortiz* outside the qualified-immunity context, there is no justification for excluding petitioners. This Court should GVR this case so the Ninth Circuit can give careful consideration to whether, as its decision in *McCollough* strongly suggests, it believes its holding in the decision below does not survive *Ortiz*. Petitioners respectfully submit that the unusual circumstances here make rehearing appropriate.

CONCLUSION

The Court should grant the petition for rehearing and grant the petition for certiorari, vacate the Ninth Circuit's judgment, and remand for reconsideration in light of *Ortiz*.

Respectfully submitted,

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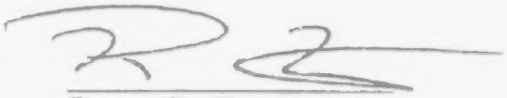
April 15, 2011

CERTIFICATE OF COUNSEL

This petition is restricted to the grounds identified in Sup. Ct. R. 44.2. This petition is presented in good faith and not for delay.



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